JD(ATL)–30–14
Lakeland, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

MCKESSON CORPORATION

and **Cases 12-CA-094552**
12-CA-097064
INTERNATIONAL BROTHERHOOD **12-CA-107756**
OF TEAMSTERS, LOCAL 79 **12-CA-111247**
12-CA-117250

Rafael Aybar, Esq., for the General Counsel.
Frederick L. Schwartz, Esq. (Littler Mendelson, P.C), for the Respondent.
Thomas J. Pilacek, Esq.*, of Winter Springs, Florida, for the Charging Party.*

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. The Respondent engaged in an unlawful plot to solicit employees to sign a petition to decertify the Union, and discharged two employees because of their union activities. It also made a unilateral change in a term or condition of employment which was a mandatory subject of bargaining, without first notifying and bargaining with the Union. It thereby violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

Procedural History

This case began on December 10, 2012, when the International Brotherhood of Teamsters, Local 79, the "Charging Party" or the "Union," filed the original unfair labor practice charge against the Respondent, McKesson Corporation, in Case 12–CA–094552. On April 15, 2014, the Union amended that charge.

On January 25, 2013, the Union filed a second charge, docketed as Case 12–CA–097064.

The Union filed a charge docketed as Case 12–CA–107756, on July 21, 2013, a corrected charge on June 21, 2013, a first amended charge on September 11, 2013, and a second amended charge on April 15, 2014.

On August 15, 2013, the Union filed a charge against Respondent in Case 12–CA–111247, and amended that charge on December 20, 2013.

On November 18, 2013, the Union filed a charge against Respondent in Case 12–CA–117250, and amended it on January 28, 2014.

On February 28, 2014, the Regional Director for Region 12 of the Board, acting for the Board's General Counsel, issued an order consolidating cases, consolidated complaint, and notice of hearing based on allegations raised in Cases 12–CA–094552, 12–CA–097064, 12–CA–107756, and 12–CA–111247.

On March 31, 2014, the Regional Director issued an order further consolidating cases, consolidated complaint, and notice of hearing which added allegations raised in Case 12-CA–117250. On April 15, 2014, the Regional Director amended the consolidated complaint.

On May 2, 2014, the Regional Director issued a further amended consolidated complaint and notice of hearing. For brevity, I will refer to this pleading as the complaint. The Respondent filed timely answers to the various complaints. Below, I will refer to Respondent's answer to the May 2, 2014 further amended consolidated complaint simply as the answer.

A hearing opened before me in Tampa, Florida, on May 19, 2014. On that day and on May 20, 21, and 22, 2014, the parties called witnesses and presented evidence. The hearing closed on May 22, 2014, and thereafter the parties filed briefs, which I have carefully considered.

Procedural Matters

Validity of Complaint

After the hearing closed, but before the parties filed briefs, the Supreme Court issued its decision in *NLRB v Noel Canning* et al., 134 S.Ct. 2550 (2014). The Court found that the President's appointment of three Board members was inconsistent with the requirements of Article II, Section 2, clause 3 of the United States Constitution, the "recess appointments clause," and therefore the appointments were invalid. Based on this holding, and on the Supreme Court's earlier holding in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010)(the Board must consist of at least three members to constitute a quorum), the Respondent now challenges the validity of the complaint.

The Respondent argues that because the Supreme Court has held that the three recess appointments to the Board were invalid, the Board lacked a quorum at the time it appointed the Regional Director who thereafter signed the complaint in this case. Further, because it lacked a quorum, the appointment of the Regional Director was invalid. Therefore, the Respondent argues, the complaint was not signed by an official authorized to do so and is itself invalid.

Thus, the Respondent's brief states, in part:

> The Supreme Court held in *Noel Canning* that the January 4, 2012 recess appointments of Members Sharon Block, Terrence Flynn, and Richard Griffin were unconstitutional, and thus the Board lacked a lawful quorum of Members during this period. While the Board lacked a lawful quorum of Members under *New Process Steel*, the Board had no authority to appoint agents to act on its behalf, and the appointment of Margaret J. Diaz as Regional Director for Region 12 on or about May 23, 2012 was therefore invalid. By virtue of her invalid appointment, Diaz lacked the authority to issue complaints and therefore, the Complaint must be dismissed.
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> * * *
>
> Because the Board's appointment of Diaz was invalid, so too is the Complaint issued by Diaz. Sections 10(b) and (c) of the Act allow the Board to designate agents to issue unfair labor practice complaints, to conduct hearings on those complaints and to make recommended decisions on the allegations of the complaints. See 29 U.S.C. §§ 160(b), 160(c). Board regulations provide that the Regional Directors are charged with issuing formal complaints for unfair labor practices in the Board's name. 29 C.F.R. § 102.15; see also NLRB Casehandling Manual (Part One) Compliance Sec. 10268.1.
>
> The present action must be dismissed because Diaz lacked the authority to issue or amend the Complaint in the present action. Issuing the Complaint was an ultra vires act and void as a nullity. See *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344, at *1 (W.D. Wash. Aug. 13, 2013) (Regional Director lacked authority to issue complaints because Board lacked authority to do so).

However, the cited District Court decision, *Hooks v. Kitsap Tenant Support Services, Inc.*, can and should be distinguished. In that case, the Regional Director had argued that even if the Board lacked authority, it was the General Counsel who delegated authority to issue complaint. The District Court rejected that argument because it concluded that the appointment of the General Counsel—more precisely, at that time the Acting General Counsel—also was invalid. The Regional Director had issued the complaint while Lafe E. Solomon served as Acting General Counsel. The District Court concluded that Solomon's appointment had not complied with the provisions of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, et seq. and Solomon, having no authority himself, could not delegate any to a regional director.

That is not the situation in the present case. The Honorable Robert E. Griffin was sworn in as General Counsel on November 4, 2013, and had been in office 4 months when Regional Director Diaz issued the initial complaint in this matter on February 28, 2014. The Respondent has not disputed the validity of Griffin's appointment as General Counsel. Accordingly, Griffin unquestionably possessed authority to issue complaints and, I conclude, could delegate it to Regional Director Diaz.

Moreover, the Board recently rejected arguments similar to those the Respondent raises here. In *Pallet Companies, Inc.* 361 NLRB No. 33 (August 27, 2014), the Board stated:

> Under the Act, the General Counsel is an independent officer appointed by the President and confirmed by the Senate. The authority of the General Counsel to investigate unfair labor practice charges, and to issue and prosecute unfair labor practice complaints, is derived directly from the language of the NLRA, not from any "power delegated" by the Board. Accordingly, the presence or absence of a valid Board quorum has no bearing on the General Counsel's prosecutorial authority in this matter.
>
> Agency staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel. 29 U.S.C. § 153(d); See *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-128 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). When a Regional Director or other designated Board agent issues a complaint, he acts for, and with authority delegated by, the General Counsel. *United States Postal Service*, 347 NLRB 885, 886 (2006); *Roadway Express, Inc.*, 355 NLRB 197, 206 (2010). In the instant matter, the Respondent does not dispute that the consolidated complaint was issued in the name of the General Counsel and with the General Counsel's authority. Under these circumstances, we find that the consolidated complaint was validly issued and not subject to attack based on the argument that the Board lacked a quorum at the time it approved the appointment of Dennis Walsh as Regional Director for Region 4.

361 NLRB No. 33, slip op. at 1 (footnote omitted). Accordingly, I reject the Respondent's argument and conclude that the complaint is valid.

Ex Parte ("Skip Counsel") Communications

Both the Board's Rules and various state rules governing attorney conduct limit when a lawyer may communicate with someone represented by a different attorney. Although there are exceptions, in general, if a lawyer knows that a person is represented by counsel, the lawyer must contact that attorney rather than "skipping" counsel and dealing directly with the individual.

The Board has promulgated rules, having the force of law, to apply this principle in formal unfair labor practice proceedings such as the present one. The General Counsel has incorporated a similar principle in his "standing orders" regarding how Board agents must conduct investigations, by including instructions in the Casehandling Manual for field examiners and field attorneys.

Most often, an employer subject to the Board's jurisdiction is not a soul proprietorship but a larger organization such as a corporation or limited liability company which necessarily speaks and acts through its officers and managers. The statements and actions of any person who meets the statutory definition of supervisor or agent of an employer can be imputed to that employer. Accordingly, the "skip counsel" principle applies to such supervisors and agents and limits when

a Board investigator or attorney may contact them directly. On the other hand, it does not prohibit direct communications with employees who are not the employer's supervisors or agents.

Respondent contends that Board personnel violated the "skip counsel" prohibition by communicating with an individual the present complaint alleges to be the Respondent's agent. More specifically, the complaint alleges both that Larry Lee Betterley is Respondent's agent and that the Respondent, acting through Betterley, unlawfully solicited employees to sign a petition to decertify the Union. Respondent denies that Betterley was ever its agent, but Respondent's denial does not moot the "skip counsel" issues.

These issues may be divided into two categories depending on whether the assertedly improper contact took place before or after the complaint issued.

The Respondent asserts that Board agents improperly interviewed Betterley during the precomplaint stage after they had reason to believe he was Respondent's agent. The Respondent also contends that Board personnel improperly communicated with Betterley after the complaint issued, indeed, on the day of hearing.

During the precomplaint, investigative stage, Board agents interviewed and took affidavits from Betterley on two occasions, March 3 and December 12, 2013. Respondent asserts that before either affidavit, Board agents had received information from another witness which should have put them on notice of a potential "skip counsel" problem. That witness was Shannika Hill. The Respondent's brief states, in part, as follows:

> The GC denies that there were any questions about Betterley's agent status at the time the Region took Betterley's affidavits, but that is simply false. See GC 50 ("At the time the first affidavit was taken, however, Betterley's status was not unclear to the Region. He was a rank-and-file employee, and the Region was not on notice that he was acting as an agent of the Employer when he collected employee signatures on the decertification petition.") Contrary to these assertions of the GC, in December 2012, the Region obtained an affidavit from former McKesson employee Hill, in which Hill identified Betterley as a manager for McKesson. Tr. 547. Thus, by December 2012 at the latest, the Board was aware of the possibility that Betterley was an agent or manager for the Company.

Hill testified at the hearing. Both the Charging Party's counsel and Respondent's attorney asked her questions regarding Betterley's status. Even after reviewing this testimony, I remain reluctant to conclude that Hill placed the General Counsel on notice that Betterley was Respondent's agent.

However, before going further, the limits of my authority should be noted. In general, the way Board agents conduct a precomplaint investigation has little if any relevance to the issues litigated at hearing. Here, the Respondent seeks to make such matters relevant by seeking sanctions, specifically the striking of Betterley's testimony.

Even if there are circumstances in which a judge properly might inquire into the precomplaint investigation, and possessed authority to do so, I do not believe they exist here. Therefore, in considering Respondent's request for sanctions, I will not take into account events during the precomplaint investigation.[1]

The postcomplaint conduct is a different matter. The Respondent asserts, and credited evidence establishes, that when a subpoenaed witness, Betterley, arrived at the hearing site on the day of hearing, someone associated with the General Counsel had a conversation with the witness concerning matters related to his testimony. Respondent argues that because the complaint alleged Betterley to be Respondent's agent, and because the Respondent is represented by counsel, the Regional Office staff should have contacted Respondent's counsel rather than communicating with Betterley when Respondent's counsel was not present.

This event, on the day of the hearing and at the hearing site, does fall within my purview. The judge has a duty to maintain the integrity of the hearing process, which well could be affected by the asserted conduct.

The Tampa Regional Office includes a hearing room, where the hearing took place on May 19 through 22, 2014. On May 19, Betterley arrived at the Regional Office pursuant to subpoena. He testified as follows concerning what happened:

> Q. Did you go into the receptionist area and ask to speak with someone, or how did you come to know that that was the individual that you needed to speak with?
> A. I came into the office area, rang the bell. That individual actually came up, asked me who I was, what I wanted. And I explained that who I was, why I was here.
> Q. What did -
> A. And -
> Q. --you say when you explained who you were and why you were there -
> A. Like I said I was -
> Q. --other than your name obviously?
> A. Oh, yeah. I said I was Larry Betterley and that I was here for --to testify for the hearing today.
> Q. Okay. And was it a male or a female that you met with?
> A. It was a male.
> Q. And you went back to that individual's office?
> A. Yes, sir.
> Q. And it was just the two of you meeting?
> A. Yes, sir.
> Q. And how long did you meet?
> A. Five, 10 minutes max.

[1] Even assuming, strictly for the sake or analysis, that I somehow possessed authority to inquire into this matter, the evidence does not persuade me that Board investigators violated the "skip counsel" prohibition at the precomplaint stage. Certainly, I would conclude that precomplaint conduct does not warrant striking Betterley's testimony, as the Respondent requests.

Q. And what did you discuss?
A. He asked if I could clarify which of the petitions that I had signed were, in fact, mine that I gotten signed.
Q. And how did he go about doing that?
A. He handed me a stack of them and had me choose which ones were mine. And I had to go through them all.
Q. And by which ones were yours, you mean what?
A. Which ones are the ones that I gotten signed.
Q. Okay. So he asked you a few signatures that you had obtained from employees in connection with the decertification petition?
A. Yes.
Q. And he asked you to review those to determine which were the signatures that you obtained?
A. Yes.
Q. And did you provide him with information about which of the signatures were yours?
A. Yes.
Q. And what else, if anything, did you discuss with the Labor Board individually?
A. He also wanted to know which were part-timers in a meeting. That's all he said.
Q. Wanted to know which ones were part-timers in a meeting?
A. Yes.
Q. And did you provide him with that information?
A. Yes, I did.
Q. Did the individual take notes do you know? Did you observe him taking any notes while -
A Not that -
Q. --he was meeting with you?
A. No, I did not.
Q. Did he ask you any other questions?
A. No.

Betterley gave this testimony on the first day of the hearing, and this testimony was limited to the ex parte issue. When he returned to the witness stand 2 days later to testify about the unfair labor practice allegations, his memory waned and had to be refreshed with his affidavits. However, Betterley gave his testimony concerning the ex parte conversation on the same day the conversation took place, while it was still fresh in memory.

Additionally, because it is the sole testimony concerning the conversation, it stands uncontradicted. Even though the person who spoke with Betterley apparently was a member of the Regional Office staff, the General Counsel did not call him as a witness or request a delay in closing the hearing so that authorization for such testimony could be obtained. In these circumstances, I credit Betterley's testimony as a reliable and undisputed account of what took place.

Clearly, the conversation concerned a matter which the complaint alleged as an unfair labor practice and about which Betterley had been subpoenaed to testify. Therefore, I conclude that the conversation constitutes a communication "about the proceeding to an interested person outside this Agency relevant to the merits of the proceeding" as those terms are used in Section 102.126(b) of the Board's Rules.

It should be stressed that the attorney who served as counsel for the General Counsel during the hearing was not the person who engaged in the ex parte communication, and I conclude that he was not aware of it until after it occurred. Rather, the General Counsel's brief identifies the person who made the ex parte contact as a Regional manager. The brief further states:

> [T]he Region's communications occurred as a result of a mistake, and were not intentional. In fact, as soon as the Region became aware of its mistake, it sought ethics guidance and notified the Respondent's counsel that the communications had taken place.

Counsel for the General Counsel is an "officer of the court" and I accept these representations as true. Indeed, the prompt disclosure of this matter allowed Betterley's testimony to be taken without delay.

However, I believe that the actions of the Regional manager properly are imputed to the General Counsel. More specifically, I conclude that the Regional manager is a "Board agent" within the contemplation of Section 102.126(b) of the Board's Rules, a section which pertains to ex parte communications.

Because the complaint had alleged Betterley to be Respondent's agent, and because the Regional manager's questions to Betterley concerned actions which the complaint alleges to be unfair labor practices, I further conclude that the Regional manager requested, within the meaning of Section 102.126(b)(1), and made, within the meaning of Section 102.126(b)(2), a prohibited ex parte communication.

However, I do not believe that the nature and circumstances of the ex parte communication are such that interests of justice and statutory policy require me to issue a notice to show cause, as authorized by Section 102.133(a) of the Board's Rules. That provision does not mandate the issuance of such a notice but allows discretion. Considering how extensively the parties already have addressed the matter, as well as the nature and circumstances of the communication, I conclude that a notice to show cause is not warranted.

Moreover, I do not reach the issue of sanctions contemplated by Section 102.133(b) and Section 102.133(c) and express no opinion about such matters. Rather, my sole concern is the effect of the ex parte communication on the fairness of the proceeding and the reliability of the testimony.

Because of the prompt disclosure of the ex parte communication, it has been exposed to sunlight which has disinfected and dissipated the potential for taint. Further, after an

examination of Betterley's later testimony about the alleged unfair labor practices, I conclude that the brief ex parte communication had no discernible effect.

The Respondent also argues that after the complaint issued but before the hearing, the General Counsel tried to contact Betterley. However, I do not believe these attempts affected Betterley's testimony.

The Respondent requests that I strike Betterley's testimony. However, taking that action would not, in my view, be consistent with my responsibility to develop a full record.

In sum, I believe that any taint caused by the ex parte communication already has been purged. Accordingly, I conclude that no further action is warranted.

Allegation Not In Complaint

One other matter causes me concern. The General Counsel's posthearing brief asks me to find that the Respondent violated the Act in a manner not alleged in the complaint.

The brief includes a section titled, "Respondent violated Section 8(a)(1) and (5) of the Act by dealing directly with employees and having unilaterally ceased sponsoring the participation of bargaining unit employees in Gasparilla events." The term "Gasparilla" refers to a local parade and related activities. In some years, the Respondent has paid the registration fee for employees to participate in the parade, and also has paid for a bus to take them to the parade and for T-shirts to wear in the parade. The complaint alleges that Respondent violated Section 8(a)(5) of the Act by unilaterally ceasing this sponsorship, but it does not allege that the Respondent unlawfully dealt directly with the employees concerning their participation. Indeed, the complaint includes no "direct dealing" allegation at all.

The General Counsel's brief concedes that the complaint did not allege such a violation. It states:

> Admittedly, the complaint did not allege that, in 2012, Respondent engaged in direct dealing with employees when it unilaterally changed a term and condition of employment without negotiating with the Union, consisting of the Gasparilla event employee benefit. However, "[i]t is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." [Citations omitted]

However, the brief does not explain why the General Counsel delayed until after the hearing closed to raise this additional legal theory. The order consolidating cases, consolidated omplaint, and notice of hearing which the Regional Director issued on February 28, 2014, included the unilateral change allegation that Respondent had ceased sponsoring employees in the Gasparilla event. Thus, the government had some knowledge regarding the relevant circumstances well before the hearing began on May 19, 2014.

The witness who gave testimony most related to a "direct dealing" theory was Chudney Allen, who took the witness stand on May 21, the day before the hearing closed. After her testimony, the General Counsel had time to move to amend the complaint. If the General Counsel had done so, the Respondent well might have requested that the hearing not close on May 22 but be continued so that it could prepare a defense and present witnesses.

A direct dealing theory raises different issues from those raised by the unilateral change theory alleged in the complaint. As the Board has stated, "Direct dealing with employees goes beyond mere unilateral employer action." *Allied-Signal, Inc.*, 307 NLRB 752, 754 (1992).

The difference between permissible discussion with employees and impermissible bargaining can be subtle and can turn on exactly what was said. Raising this issue after the hearing already has closed creates a significant due process issue because the Respondent did not have the opportunity to present evidence specifically focused on the question of direct dealing. Likewise, the Respondent did not have the chance to address this matter in cross-examining the General Counsel's witnesses.

Respondent, not on notice that it would have to defend against a "direct dealing" allegation, did not examine its own witnesses or cross-examine the government's witnesses to develop a record on this issue. Accordingly, I cannot conclude that the General Counsel's proposed "direct dealing" theory has been fully litigated.

Additionally, a posthearing brief is not the appropriate vehicle for what is tantamount to a motion to amend the complaint. Sec. 102.17 of the Board's Rules provides that a complaint "may be amended upon such terms as may be deemed just, . . .at the hearing and until the case has been transferred to the Board pursuant to section 102.45, *upon motion*, by the administrative law judge designated to conduct the hearing." (Italics added)

The motion requirement is significant because the record, as defined in Section 102.45(b) of the Board's Rules, includes motions but does not include briefs to the administrative law judge. Moreover, a motion places opposing parties on clear notice of the duty to respond.

For all of these reasons, I deny the General Counsel's request to find a "direct dealing" violation not alleged in the complaint.

Admitted Allegations

Based on the admissions in Respondent's answer, I conclude that the General Counsel has proven the allegations raised in complaint paragraphs 1(a) through 1(j), 2(a) through 2(c), 3, 4(a), 5(a) through 5(c), 10(b), 10(c), 11(a), 11(c), 11(d), 12(a), 12(b), 12(d), 12(f), and 12(g).

More specifically, I find that the Charging Party filed and served the charge as alleged in complaint paragraph 1 and its subparagraph.

Further, I find that at all material times, Respondent has been a Delaware corporation with its principal office and place of business located in San Francisco, California, and other

places of business located throughout the United States, including a place of business located in Lakeland, Florida. Further, I conclude that the Respondent is an employer engaged in commerce within Section 2(2), (6), and (7) of the Act, and satisfies both the statutory and discretionary standards for the exercise of the Board.

Based on the admissions in Respondent's answer, I find that at all times material to this case, the following individuals occupied the positions indicated by the titles to the right of their names, and that each was a supervisor of Respondent within the meaning of Section 2(11) of the Act, and an agent of Respondent within the meaning of Section 2(13) of the Act:

Chudney Allen	Manager
Darrell Anderson	Operations Manager
Norman Fulmer	Senior Human Resources Representative
Scott Garrett	RX Supervisor
Jeff Gasparini	Vice President and General Manager
Johnny Gonzalez	Supervisor
Accino Hart	OTC Supervisor
Jeff McCoy	Assistant Director of Operations
Elieser Nieto	Operations Supervisor
Cynthia Thornton	Plant Manager
Desiree Lyles Wallace	Employee Relations Manager

At hearing, Cynthia Thornton identified herself as "director of operations" rather than as "plant manager." The person identified in the complaint as "operations manager," Darrell Anderson, did not testify. However, regardless of exact title, Thornton's testimony leaves no doubt that she is one of the highest-ranking managers at the Respondent's Lakeland facility and no evidence contradicts the Respondent's admission that Thornton is its supervisor and agent.

Respondent has admitted, and I find, that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act. Further, I find that on October 13, 2011, the Board certified the Charging Party as the exclusive bargaining representative of the following unit of Respondent's employees, which is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act."

> All full-time and regular part-time material handlers, lead material handlers, maintenance technicians, assistant maintenance technicians, lead maintenance technicians and maintenance employees employed by the Employer at its distribution center facility in Lakeland, Florida; excluding all other employees, "lumpers," office clerical employees, quality control employees, inventory employees, managerial employees, confidential employees, guards and supervisors as defined by the Act.

The Respondent admits and I find that at all material times since October 13, 2011, the Union has remained the exclusive bargaining representative of the employees in this Unit, pursuant to Section 9(a) of the Act.

Other admissions in the Respondent's answer will be discussed in connection with specific unfair labor practice allegations which the Respondent denies.

Unfair Labor Practice Allegations

Credibility Resolutions

In 2011, the Union conducted a campaign to organize employees at Respondent's distribution center in Lakeland, Florida. On September 29, 2011, the Union won a Board-conducted election and on October 13, 2011, the Board certified the Union as the exclusive bargaining representative of the warehouse employees in the unit described above, a unit which Respondent has admitted to be appropriate under Section 9(b) of the Act. That much is undisputed.

However, much of this case turns on the vigorously disputed testimony of a former manager, Chudney Allen. A number of Respondent's witnesses denied making statements which Allen attributed to them. For the following reasons, I resolve these conflicts in testimony by crediting Allen.

Based on my observations of the witnesses, I conclude that Allen's testimony is very reliable. Indeed, her demeanor as a witness, particularly on cross-examination, singularly impressed me as trustworthy.

However, no judge should forget that inferences from witness demeanor are highly subjective and vulnerable to unnoticed and therefore difficult to correct bias. Certainly, no witness should be credited or discredited because, to take a hypothetical example, at some subconscious level, he reminds the judge of his brother-in-law. Accordingly, and especially when witness demeanor creates such a compelling impression, the judge does well to hold the demeanor based conclusion up to the light, to see if it is consistent with other measures of credibility.

One such criterion focuses on the witness's interest in the outcome of the proceeding. The Respondent had discharged Allen, so, arguably, she might want to see the Respondent lose. On the other hand, the managers who contradicted Allen remain employed by Respondent and therefore have some interest in Respondent prevailing.

Observing Allen on the witness stand, I did not detect any vindictiveness or rancor. Likewise, she did not seek to aggrandize herself. Allen had worked her way up from the ranks and, at one point, criticized her own performance as a warehouse employee. "I'm a slower picker" she said, referring to the task of locating and gathering merchandise to be shipped to a customer. "There are people in there that can pick 300 times faster than me, and they could do it with their eyes closed."

Sometimes at a hearing, the testimony is vivid enough that the personality of the organization itself—its institutional or corporate culture—can be glimpsed. Such cultures vary widely. Some embody and communicate that the law should be followed scrupulously and

others do not. To the extent that a corporate culture may be inferred from the testimony of other witnesses, it is one consistent with the acts described in Allen's testimony.

Additionally, there are reasons, apart from witness demeanor, to doubt the reliability of some testimony by witnesses contradicting Allen. For example, the testimony of Cynthia Thornton, the director of operations at the Respondent's Lakeland facility, included a number of nonresponsive answers.

In sum, after reviewing the record, I believe that the conclusions I reached observing Allen's demeanor are correct. Therefore, I conclude that she is a reliable witnesses and resolve conflicts in the testimony by crediting hers.

The demeanor of witness Glenn Gray, particularly on cross-examination, also impressed me greatly. My review of the record does not dispel my impression that he was a conscientious witness, recounting the truth to the best of his memory. It is true that his memory could have been better concerning the dates events occurred, but that does not reflect on his honesty. Accordingly, I rely on his testimony and resolve conflicts by crediting it. Other credibility matters will be discussed later in this decision.

The Anti-Union Plot

As noted above, the Board certified the Union as exclusive bargaining representative on October 13, 2011. Under long established precedent, this certification cannot be contested for a year. Towards the end of this period, however, seven individuals began soliciting employees to sign a decertification petition which ultimately was submitted to the Board after the expiration of the certification year.

The credited evidence establishes that these individuals did not act on their own but rather on behalf of management and with management's assistance. Based on the testimony of former manager Chudney Allen, which I credit, I find that the Respondent had embarked on a plot to rid itself of the Union and that the seven individuals collecting signatures were part of the plot.

In December 2011, Allen became operations manager and assigned to the second shift, where she was the highest-ranking manager. In about July 2012, Allen attended a meeting of all night-shift supervisors. The vice president and general manager, Jeff Gasparini, was present. So was the director of operations, Cynthia Thornton, but Gasparini was the principal speaker. Allen gave the following testimony concerning what Gasparini told the assembled supervisors:

> Q. What did he say?
> A. The purpose of the meeting was to start the decertification --decert plan against the Union, and that seven people had been elected to help with this process.
> Q. Was --were those seven --who --were those seven individuals given a name?
> A. Yes. They were called the “magnificent seven.”

Q. And were those --did --and who said that?
A. Gasparini; that was the phrase he coined for them.
Q. Okay. And what else did he say during this meeting?
A. He listed the names of the seven people who would work for the decertification plan to gather signatures. They were Nicole Meyers, Leo Laboy, James Acton, Cheryl Bailey (phonetic), Larry Betterley, Pam Seaton, Nick Branigan, and if and when we saw these people gathering votes, we were to go the other way.

It may be noted that Gasparini did not specifically deny making the "magnificent seven" comment. Gasparini, the highest-ranking manager at the facility, testified after Allen attributed to him the "magnificent seven" remarks, so his failure to deny his use of that phrase carries particular significance.

Likewise, Thornton did not deny that Gasparini referred to the petition circulators as the "magnificent seven.[2] The day after Allen testified, Thornton returned to the witness stand, this time called by Respondent's counsel, who asked about some of the statements Allen had attributed to her. Thornton denied making these statements. However, Thornton was not asked about the July 2012 meeting at which, according to Allen, Gasparini told supervisors to go the "other way" if they saw one of the "magnificent seven." Considering the diligence with which Respondent's counsel elicited Thornton's denials concerning other matters, I believe it is significant that she neither denied that Gasparini instructed the supervisors to go the "other way" nor that Gasparini referred to those circulating the decertification petition as the "magnificent seven." For the reasons discussed above, I credit Allen's testimony where it conflicts with other witnesses and would credit it here even if Gasparini or Thornton had contradicted it, but they did not.

Additionally, Gasparini admitted at least some contact with the decertification effort. Gasparini testified that Nicole Meyers asked him how to go about decertifying the Union. He checked with counsel and learned, in Gasparini's words, "the only thing that we were able to provide is something called a letter of instruction." Gasparini testified that either he or Thornton provided this letter to Meyers. The "letter of instruction" is not in evidence and Meyers did not testify.

Employee Pam Seaton was one of the "magnificent seven." Allen testified that there were occasions when General Manager Gasparini, Director of Operations Thornton or Assistant Director of Operations Jeff McCoy would instruct Allen to allow Seaton to go into the front office, even though Seaton's ID badge did not grant her access to this area. Allen testified that Seaton visited the front office to retrieve "anti-union propaganda" which Seaton would distribute in the break room.

[2] Early in the hearing, the General Counsel called Thornton as a witness and examined her pursuant to Rule 611(c) of the Federal Rules of Evidence. The General Counsel asked whether, before the filing of the decertification petition, she had spoken to "any managers or leads about the decertification of the Union." Thornton answered that she had not. She also denied knowing any "employer officials" who, before filing of the petition, had spoken "with employer officials about decertification of the Union." She gave this testimony before Allen took the witness stand and was not specifically asked about the July 2012 meeting when, according to Allen, Gasparini had used the term "magnificent seven."

Although McCoy testified the day after Allen's testimony, he did not deny instructing Allen to grant Seaton access to the front office. Allen's testimony that he gave this instruction stands uncontradicted and I so find.

Gasparini and Thornton did deny telling Allen to allow Seaton in the front office. However, for the reasons discussed above, I credit Allen's testimony. Therefore, I conclude that they did give Allen such instructions.

Allen also testified that General Manager Gasparini would instruct Allen to assign Seaton to work in particular areas. According to Allen, on one occasion Gasparini told her that if Allen had to choose between making a truck late and placing Seaton in the area which Gasparini had specified, Allen should let the truck be late.

Gasparini denied telling Allen to assign Seaton to work in areas he specified. Crediting Allen, I find that he made the statements Allen attributed to him.

Even apart from Allen's credited testimony, there are reasons to link the decertification effort to Gasparini. As will be discussed further in connection with complaint paragraph 9(a), employee Timothy Vera testified that, in July 2013, Gasparini approached him and said that there was a "petition going around" and that it would be in Vera's best interest to sign it.

It should be stressed that this "petition" was not the same document as the decertification petition circulated earlier, but rather part of a letter urging the Union to withdraw unfair labor practice charges which had resulted in the decertification petition being blocked. However, Gasparini's involvement in this effort to get the decertification petition "unblocked" does reflect his continuing intent to have the Union decertified.

The way Gasparini began this conversation with Vera also is significant. Vera testified that he was leaving the break room when Gasparini said "Tim, Tim, come here." Vera works a second job and sometimes had discussed it in conversations with Gasparini. According to Vera, Gasparini then told him to act as if Gasparini were talking about Vera's night job "because I'm not supposed to be talking to you about this."

Gasparini denied having this conversation with Vera but, for reasons discussed below, I credit Vera. I find that Gasparini made the statements Vera attributed to him. Moreover, the testimony of another witness describes a separate but remarkably similar conversation.

According to employee Patrick Myers, on about July 24, 2013, he was working on the night shift and, after the start-up meeting, Gasparini approached and asked Myers to take a walk with him. Myers testified, in part:

> [H]e told me, first of all, this conversation never happened. So I said, okay. I looked at him and he's like, you know, you're a grown man, you know, you a grown man, you can --can make your own decisions, you know, whichever way you want to go, but if anybody was to come up to you with something to read, it

> will be in your best interest to sign it. And by this time, we already done made it to the next intersection, and he just walks off and says again, and remember, this conversation never happened.

Although Gasparini denied making the statement attributed to him by Myers and, indeed, denied having any conversation with Myers concerning decertifying or getting rid of the Union, for a number of reasons I credit Myers' testimony rather than Gasparini's. First, it may be noted that Respondent's cross-examination of Myers failed to diminish Myers' credibility.

On direct examination, Myers had testified that Gasparini had approached him after a start-up meeting. On cross-examination, Respondent elicited testimony that start-up meetings typically took place on Mondays and Thursdays and then noted that the claimed date of the conversation, July 24, 2013, was a Wednesday. However, Myers had not volunteered the July 24, 2013 date during direct examination. Rather, the General Counsel had asked Myers if he remembered attending a start-up meeting "on or *about* July 24 of 2013." (Italics added.)

Moreover, about 2 weeks after his conversation with Gasparini, Myers had described it in an email. That email began "On or about July 24 or 25, 2013. . ." Thus, if Myers' conversation with Gasparini took place on Thursday, July 25 rather than July 24, that date is still consistent with both his testimony at the hearing and with the earlier email. There is no discrepancy with which to impeach Myers.

Additionally, even though Vera and Myers described two separate conversations, the statements they attributed to Gasparini have a similar style and reflect a common motivation, ousting the Union. Gasparini himself did not deny calling those who circulated the decertification petition the "magnificent seven," and admitted that he gave one of these seven a "letter of instruction" about union decertification. Those actions are hardly inconsistent with the statements which Vera and Myers attributed to him.

Of course, it certainly may be argued that Gasparini's willingness to admit giving the "letter of instruction," as well as his silence about the "magnificent seven" statement attributed to him, indicate that he was scrupulous about telling the truth. That factor certainly should be weighed in the balance. However, the following considerations weigh in the opposite direction.

Because Gasparini was one of Respondent's managers, indeed, the highest-ranking official at the facility, it was in his interest to deny making statements which constituted unfair labor practices. On the other hand, Vera and Myers were rank-and-file employees who might well have felt some trepidation giving testimony against this corporate vice president. Indeed, they gave this testimony after Respondent had discharged two union supporters. In these circumstances, it seems unlikely that they simply would have made it up.

Further, their testimony included considerable detail. It is more convincing than Gasparini's denials, such as the following:

> Q. And directing your attention again to the same time period of July 2013, did you ever have any conversation with Pat Myers in which you indicated

to him that a petition was going around and it would be in his best interest to sign it?
A. No.

Weighing all of these factors, along with my observations of the witnesses, I conclude that the testimony of Vera and Myers is more reliable and therefore I credit it. Thus, I find that during his conversation with Myers, Gasparini twice told him, in effect, that the conversation was not happening. Then, at the hearing, Gasparini testified that the conversation never happened. However, Gasparini did not convince Myers and he does not convince me.

Gasparini's "never happened" remarks to Myers suggest a troubling casualness about his conduct, particularly when considered along with a statement he made to Vera. Gasparini told Vera to act as if they were discussing something else "because I'm not supposed to be talking to you about this." The fact that Gasparini knew that what he was doing was improper, but did it anyway, suggests that he considered the Act something to be thwarted rather than followed.

Indeed, all the credited evidence forms a consistent picture of a calculated campaign, guided by the facility's top management, to circumvent the law, which prohibits an employer from providing material assistance to a decertification campaign. The plan left little to chance.

Former Manager Chudney Allen credibly testified that Director of Operations Thornton instructed her to call meetings of employees but to make sure to include one of the seven (the "magnificent seven") who were circulating the decertification petition. Thornton further instructed Allen to prearrange for someone—another manager—to call her out of the meeting. After Allen left, the "planted" employee would solicit the other employees to sign the decertification petition.

Allen followed the plan as directed. Her doing so will be discussed below in the section discussing complaint paragraph 6. The record establishes that other supervisors besides Allen also followed the plan. Employee Shannika Hill credibly testified about a meeting called by her supervisor, Accino Hart, a meeting also attended by one of Gasparini's "magnificent seven," in this instance, Larry Betterley:

Q. Okay. And did Mr. Hart conduct the entire meeting?
A. No.
Q. Okay. What happened?
A. Mr. Hart came in and he got a call on the walkie talkie, so he had to leave out of the room with us and Mr. Larry Betterley, he was in there with us and we was all sitting around a table waiting for Mr. Hart to be able to come back, but he never came back into the meeting. So Mr.—
Q. How many employees were present?
A. Ten or 12 of us, the same amount.
Q. Okay. Go ahead.
Q. What did he say?
A. Always the part timers. And we all sat down and Mr. Betterley, he began to speak about the Union and he also went to telling us that--you know,

> about being able to sign a blank piece of paper to see what McKesson can offer us. If we don't go with the Union, that McKesson can pay us $15 an hour, you know, it was just a lot of talking.

According to Hill, Betterley sent a notebook pad around the table with instructions for each person to print his or her name and then to sign and date it. Betterley's testimony essentially corroborates Hill's except for one thing. Betterley did not admit that he was acting according to a plan. In his version, he simply saw the opportunity to solicit signatures and happened to have his pad.

Based on my observations of the witnesses, where they testimony conflicts, I credit Allen rather than Betterley. However, even Betterley admits some involvement by management in his decertification effort.

As already noted, Betterley professed some memory difficulty and the General Counsel refreshed his recollection with his pretrial affidavits. Respondent did not object to the admission of Betterley's affidavits into evidence and I treat them as substantive evidence. *Alvin J. Bart & Co.,* 236 NLRB 242 (1978). In the affidavit he signed on March 13, 2013, Betterley described having contacts with Supervisor Scott Garrett and Director of Operations Cynthia Thornton:

> The Teamsters Union was elected to represent McKesson employees in late 2011. In about mid 2012, I asked Scott Garrett how we would go about getting the union out. Garrett told me that he did not know and that I should ask Cindy Thornton, Plant Manager. After one of the daily start up meetings in a one-on-one meeting with Thornton, I asked Thornton what I needed to do to get the union out. Thornton said that she could not help me but that she could get me a memo off a union.org website that told what we needed to do to get a petition started. In about the first week in September 2012, Thornton provided a copy of the memo from the union.org website to me. Material handlers Pam Seaton, Nick Brannigan and Nicole Meyers, met and discussed the decertification process outside of work afterhours for about fifteen minutes. I also talked briefly with Seaton (she works in my department) and Brannigan. I didn't fully understand the union.org memo but Pam Seaton explained it to Brannigan and me. Seaton explained that we needed to get 30% of employees to file a petition to decertify the union.

It may be noted that the "magnificent seven" identified in Allen's testimony include Seaton, Brannigan, and Meyers as well as Betterley. However, Betterley downplayed any involvement of management in their efforts to decertify the Union. For example, although he admitted soliciting signatures at the meeting described by Hill, he described it as a spontaneous decision, not part of a prearranged plan. Thus, Betterley's affidavit states:

> Hart left the meeting after about a half hour, leaving Seaton and me to talk to them and wrap up the meeting. I do not know why Hart left but he received a call either on his walkie-talkie or cell phone. Hart told me that he had to go and asked me to wrap up the meeting.

To accept these statements at face value, I would have to ignore Allen's testimony that she conducted a similar meeting and arranged to be called away from that meeting, as well as her testimony that Thornton had instructed her to do so. However, based on my observations of the witnesses, I have concluded that Allen was the most credible witness who testified.

Allen's testimony also established that the plot was not limited to this one machination. Another stratagem focused on avoiding getting caught.

One way to minimize the chance that prounion employees would discover the decertification effort was to solicit signatures while the Union's bargaining committee was out of the building, attending a negotiating session. However, there would still be the possibility that the union committee might receive word of the solicitations and return to the facility earlier than expected. According to Allen, the Respondent took the precaution of instructing the computer not to recognize the badges of employees on the Union's bargaining committee:

> A. Okay. So, we are issued badges that allows us to get into the gate. And then those same badges would allow us entry into the building. But if you shut a badge off, through the system, once you get to the gate, it won't allow you to get into the gate, you'll have to ring the buzzer, as if you're a visitor. And you have to say, you know, hey, I'm Chudney, my badge is not working.
>
> * * *
>
> And that would give a manager ample opportunity to meet you at the door to figure out what you need and why are you there, because you're on a negotiation team and you shouldn't be in the building at work. So, if anybody alerted them that signatures were being taken, they wouldn't be able to make immediate entry to the building.
>
> Q. Okay. And who was talking about this?
>
> A. Cindy Thornton.

For reasons discussed above, I have concluded that Allen's testimony is reliable and credit it. However, this particular testimony gave me pause. How likely was it that people in real life (as contrasted to fictional characters on, say, *Mission Impossible*) would go to such lengths? Other testimony proved instructive.

As discussed below in connection with complaint paragraph 12(d), Respondent expended considerable effort to build a case against a well-rated employee after he went with a union delegation to Respondent's stockholders meeting, spoke out about wages and was quoted in the *Wall Street Journal*. From the amount of effort spent fabricating a pretext a consistent picture emerges: Respondent's management was not averse to artifice.

Allen also credibly testified that Thornton said that when she received information that an employee had work-related concerns, she would talk to that individual and try to "flip" the employee. If the employee could not be "flipped," Thornton would list her among the "black shirts," so named because employees supporting the Union sometimes wore black shirts

provided by the Union. The fact that Respondent's director of operations kept a list of employees who supported the Union is further evidence that Respondent had laid its plans carefully and in detail.

In sum, I conclude that Betterley did not act on his own, but as part of an effort coordinated by Respondent to decertify the Union.

Status of Betterley and Seaton

Complaint paragraph 4(b) alleges, but Respondent denies, that Larry Betterley and Pamela Seaton are Respondent's agents within the meaning of Section 2(13) of the Act. Based on Allen's testimony, I conclude that the General Counsel has proven these allegations.

However, I do not agree with the "apparent agency" theory advanced in the General Counsel's brief. As the term "apparent agency" itself suggests, such a theory arises when a putative principal has made some statement or taken some action which creates the appearance that another person is an agent. See, e.g., *Sanitation Salvage Corp.*, 342 NLRB 449, 451 (2004); *Hausner Hard-Chrome of Kentucky, Inc.*, 326 NLRB 426 (1998). That is not the situation here. To the contrary, the success of Respondent's plan to decertify the Union depended on Betterley *not* appearing to be Respondent's agent. If the Respondent made any statement or took any action which linked it to circulation of the decertification petition, it would risk invalidating the effort, so the "magnificent seven," including Betterley and Seaton, had to appear to be acting independently.

Respondent was working through Betterley and Seaton to accomplish the decertification and, therefore, they were Respondent's actual agents, not merely apparent agents. (Because such agency status could not be revealed, it might seem apt to call them Respondent's "secret agents," but that term carries another connotation.)

The Board's precedents for determining agency status typically do not involve the exact fact pattern found here. The Board asks whether, under all the circumstances, employees reasonably would believe that the employee in question was reflecting company policy and speaking and acting for management. See, e.g., *Albertson's, Inc.*, 344 NLRB No. 141 (July 29, 2005). Here, Respondent kept its connection to the "magnificent seven" secret, so employees did not know "all the circumstances."

However, the "magnificent seven" clearly were furthering the Respondent's plan. Thus, Vice President and General Manager Gasparini spoke to the supervisors, informing them of the "magnificent seven" and instructing the supervisors to stay out of their way. Based on the totality of the credited evidence, I conclude that Betterley and Seaton were Respondent's agents. See *Tyson Foods, Inc.*, 311 NLRB 552 fn. 2 (1993).

Complaint Paragraph 6

Complaint paragraph 6 alleges that on various dates in July through September 2012, including on or about August 5and September 6, 2012, and on other not precisely known dates in

July through September 2012, the Respondent, by the actions of Chudney Allen, Larry Betterley, Accino Hart, Jeff McCoy, and Pamela Seaton, at its Lakeland facility, solicited employees to sign a petition to get rid of the Union as their exclusive collective-bargaining representative. The Respondent denies this allegation.

As discussed above, the credited evidence establishes that Director of Operations Thornton instructed Allen to convene employee meetings at which one of the "magnificent seven" would be present, then arrange for someone to call her out of the meeting. In her testimony, Allen described how she followed those instructions:

> Q. Okay. And tell me what happened at the first meeting, at that meeting.
> A. Okay. At that particular meeting, that was the one where I asked them, hey, you know, do you see anything differently that we could do-
> Q. You're asking who?
> A. The part-timers.
> Q. Okay.
> A. The part-time employees. I'm asking them, hey, do you see anything differently we could do or anything that we could do better, any ideas that you have for improvements. So we started talking. And into that conversation Scott Garrett paged me over the walkie saying, hey Chudney -
> Q. Over the what?
> A. Walkie. We use walkie-talkies as means of communication throughout the building.
> Q. Okay.
> A. So he paged me over the walkie-talkie for me to come downstairs for an issue. So I apologized and said, I'm so sorry, I'll be back, let me go downstairs to see what's going on and I'll come back. That was then the cue for Larry Betterley and Pam Seaton to jump in and do what they needed to do, as I left the room.

As discussed above, Betterley admitted soliciting signatures on the decertification petition at another meeting, called by Supervisor Hart, and I have credited this testimony, which is consistent with the testimony of another witness, Shannika Hill. However, I regard as disingenuous Betterley's disavowal of knowledge of why Hart was called out of the meeting. Similarly, I do not believe that, when Hart left the meeting, Betterley made a spur of the moment decision to solicit signatures. Rather, I conclude, based on Allen's credited testimony, that Betterley was following Respondent's plan.

Respondent's brief argues that management provided nothing more than ministerial aid to the decertification effort, "did not actively encourage, solicit, engage, or assist the employees in pursuing that petition. Indeed, the evidence shows that management representatives of McKesson knew only that a decertification petition was being distributed and signed by bargaining unit employees." However, contrary to Respondent's argument, the credited evidence proves just the opposite.

My observations of the witnesses lead me to believe Allen's testimony is quite reliable, but it should be noted that other credited evidence not only is consistent with Allen's testimony but gives it further meaning and dimension. Thus, testimony besides Allen's shows Respondent's stratagem—having a supervisor convene a meeting and then having an accomplice call the supervisor out of the meeting by walkie talkie message—in actual use. The credited evidence comes together to form a consistent picture of a decertification strategy orchestrated by the facility's top management and implemented by Vice President Gasparini's "magnificent seven."

Respondent's brief includes a heading stating "The Facts Do Not Support That The Decertification Petition Was Tainted Through The Actions of McKesson Management or Its Agents." To the contrary, the credited evidence establishes that the decertification petition was not just tainted but painted, and with a heavy coat.

In sum, I conclude that the government has proven the allegations in complaint 6, and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint Paragraph 7

Complaint paragraph 7 alleges that on or about September 12, 2012, Respondent, by Chudney Allen, at its Lakeland facility, prohibited employees from distributing literature during non-work hours in it parking lot. Respondent has denied this allegation.

Bargaining unit employee Eric Dior credibly testified that, at a meeting in July or August 2012, Manager Chudney Allen announced that employees no longer could gather in the parking lot "due to safety reasons."

Allen did not deny making such an announcement. She also testified about an incident in the parking lot which took place several weeks later. Based on the record, I conclude that it occurred on or about September 12, 2012, the date alleged in complaint paragraph 7. Allen, who managed the night shift, became aware of a ruckus in the parking lot. She testified that she had a security guard accompany her to the parking lot to investigate:

> A. It was screaming and yelling and slur words and people cussing and you got me F'd up and y'all need to do something about him. This is crazy. I don't want the paper. It--it was all over the place.
> Q. So who was involved? From what you saw, who was involved in this friction?
> A. Okay. He approached Pam Seaton. He approached-
> Q. He being?
> A. Tim Jankowski. He approached Michelle Hitson (phonetic). He approached Larry Eaton.
> Q. These were all individuals who were in the parking lot that you saw?
> A. They--they were in the parking lot that I saw.

Jankowski, a union supporter, was trying to hand out union-related literature. Allen testified that she understood that Jankowski had the right to distribute union literature and was

not trying to stop him. However, her testimony makes clear that she did instruct him not to do so in the parking lot:

> So I told him, I said, Tim, if you want to hand out your paperwork, hand it out to the people who want it rather than trying to force it on the people who don't, I said because we do have a non-solicitation policy here. I said it's posted right when you come through our gate and it's also posted at the front of the building as you walk into the building. And he told me no, that he was going to hand out his --his paperwork and if I was stopping him from handing out his paperwork, he was going to file a ULP with the Union and I said okay.

On September 14, 2014, Allen sent an email to Thornton concerning a discussion with Jankowski. He had stopped by Allen's office for another purpose, apparently related to his health insurance, and then brought up the parking lot incident. Allen's email stated, in part, as follows:

> He [Jankowski] wanted to know if I had spoken with you concerning the issue, and wanted to know if he could hang out in the parking lot. I explained to Tim that you were aware of the situation and that he could not loiter in the parking lot. I explained to Tim that we have a no solicitation policy here at McKesson. He said the Federal Government gives him the right to fight for his cause. I told him if a decision is made that allows him to loiter then you, Jeff, or JPG will let me know. He told me that he will respect my wishes and not hang out in the parking lot but he will be filing paperwork on Friday. And if he cannot hang out in the parking lot, he will be standing at the gate doing what he needs to do. I told him that he could be in the break room, he told me that he did not feel comfortable in front of our cameras. He said the outside camera footage is not that good, he would feel better out there.

The initials "JPG" refer to Respondent's vice president and general manager, Jeffrey Gasparini.

The record indicates that Respondent later rescinded its policy prohibiting solicitation and distribution in its parking lot. Nonetheless I conclude that Allen's statements to Jankowski, prohibiting him from distributing literature in the Respondent's parking lot, interfered with employees in the exercise of Section 7 rights. See *Golub Corp.*, 338 NLRB 515 (2002). Accordingly, I recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint Paragraph 8

Complaint paragraph 8 alleges that sometime in July 2013 Respondent, by Jeff Gasparini, at its Lakeland facility, provided employees with a letter addressed to the Union to be signed by employees, petitioning the Union, among other things, to withdraw unfair labor practice charges against Respondent, to permit a decertification vote to proceed, and/or to disclaim interest in representing the unit. The Respondent has denied this allegation.

To prove this allegation, the General Counsel relies on evidence from Betterley. However, Betterley's memory failed him:

> Q. And do you remember going with Pam Seaton to Mr. Gasparini to talk to him about doing a letter to get rid of the Union?
> A. Sounds familiar. Yes.
> Q. And do you remember what Mr. Gasparini told you in response to you going to him?
> A. No, I don't.

The General Counsel tried to refresh Betterley's recollection with a pretrial affidavit and also introduced his two affidavits into the record. I rely on them as substantive evidence. *Alvin J. Bart and Co., Inc.*, above.

Betterley stated in his December 3, 2013 affidavit in part as follows:

> In late July or early August 2013, material handler Pam Seaton, who works nights and I discussed getting rid of the union. I do not remember where I heard it but I know that as a last resort to get rid of a union, we could get signatures on a petition. I do not recall the date but on a workday afternoon, prior to coming on shift, Seaton and I went to JPG, a.contract.a. Jeff Gasparini to talk to him about doing a letter to get rid of the union. I assumed that because of his position, Gasparini could help us because he is the one who reads with the lawyer stuff dealing with the Union. Gasparini told us that he could help us with the letter but that that was all he could do. Gasparini did not have the letter at the time but said that he would provide it to us. Seaton and I met with Gasparini for about 15 minutes. The next day, while I was sitting alone in the break room prior to going on shift, Gasparini came in and gave me a copy of a single-page letter with two paragraphs on it, the gist of which was: as evidence by the attached signatures, we no longer wish to be represented by Local 79, International Brotherhood of Teamsters. I do not recall the exact words.

According to Betterley, he and Seaton solicited employees to sign the letter. Betterley said that he had no further contact with Gasparini concerning the letter.

For clarity, it may be worth repeating that the circulation of a decertification petition in 2012 and the circulation of letter to the Union in 2013 are two separate matters. To avoid confusion, I will refer to the 2013 letter as the "go away" letter.

Gasparini testified that Betterley never asked him how employees could go about *decertifying* the Union. However, his testimony doesn't specifically address the "go away" letter. Betterley testified the day before Gasparini, which placed Respondent on notice of the matters which Gasparini needed to address when he took the stand. In this context, Gasparini's silence is significant.

Thus, although Respondent knew that Betterley had testified that Gasparini met with

Betterley and Pam Seaton twice, and provided them with a letter to send to the Union, he neither described such a meeting nor specifically denied it. (He did mention having conversations with Seaton about the Union but not in the context of a meeting with Betterley. He said nothing about providing them a letter.)

In sum, I conclude that Gasparini did provide Betterley and Seaton with a "go away" letter to send to the Union.

Betterley solicited employees to sign this letter, and some of those solicitations were during working time. However, from the present record I do not conclude that Respondent's management facilitated its circulation in the same way management assisted the "magnificent seven" when they circulated the decertification petition. For example, the record does not establish that management told supervisors to "go the other way" or conducted meetings which the convening supervisor would leave midway, allowing for the solicitation of signatures.

The Union received the "go away" letter, addressed to President and Business Manager Ken Wood, on August 2, 2013. It stated:

> Dear Mr. Wood:
>
> As you will see from the attached signatures, we are the majority of the bargaining unit employees at McKesson's facility in Lakeland, Florida. We are writing to tell you that we are not interested in being represented by Teamsters Local 79. We want the decertification vote to go forward, or we want Local 79 to inform the NLRB that it is no longer interested in representing us.
>
> As you know, the decertification petition was filed in October of 2012. Since that time, Local 79 has filed four "blocking charges" with the NLRB, most recently on June 21, 2013, in an effort to keep the decertification vote from going forward. Local 79 has also refused to allow us to vote on the Company's contract offer, and has interfered with our relationship with our customers, by passing out flyers that we did not approve, and that contain negative information about McKesson. Enough is enough. Either the decertification vote should go forward or Local 79 should leave us alone and let the NLRB know that it is not interested in representing us.
>
> Sincerely,
>
> See Attached Signatures
>
> cc: Steve Vairma, Teamsters Warehouse Division Director

Attached to the letter were 22 pages, each with the following words printed by hand: "I have reviewed the letter to Ken Wood of Teamsters Local 79 and I agree with the letter." Together, the pages bore 89 signatures.

In *Ernst Home Centers, Inc.*, 308 NLRB 848 (1992), the Board found that an employer had not unlawfully assisted an employee who circulated a decertification petition even though it answered the employees' questions about decertification and, through one of its managers, provided the employee with language for the petition. In finding that the General Counsel had not established unlawful assistance, the Board noted that the evidence did not answer the question of who, if anyone, suggested or encouraged the employee to file the petition.

The issue under consideration here does not involve the circulation of a decertification petition but of the "go away" letter. Nonetheless, the same principle would apply. Therefore, in analyzing the evidence here, I will begin with the issue of whether Respondent suggested or encouraged Betterley to solicit employee signatures and then send the letter.

Although there is little direct evidence that the Respondent prompted Betterley to send this particular letter, that event did not occur in isolation. Based on Allen's credited testimony, I have found that Respondent actively and unlawfully assisted the circulation of the decertification petition in 2012 and that the "magnificent seven" employees were acting as Respondent's agents when they did so. However, that effort did not achieve the result that Respondent sought, a decertification election, because the Union filed unfair labor practice charges which blocked the further processing of the decertification petition.

Accordingly, Respondent remained obligated to bargain with the Union and to do so indefinitely. Moreover, because the Union remained the employees' bargaining representative, it might well continue to engage in activities which embarrassed Respondent, such as passing out handbills. (The Union also sent a delegation to the Respondent's stockholders meeting, which will be discussed below in connection with complaint paragraph 12.)

Frustrated by this situation, Respondent could do nothing but vent, yet if it did even that, its words could have legal consequences. Instead, Respondent expressed its frustrations in words attributed to the employees who signed the "go away" letter it had drafted. For example, the letter stated:

> Local 79 has . . .interfered with our relationship *with our customers*, by passing out flyers that *we did not approve*, and that *contain negative information about McKesson*. [Italics added.]

Both Betterley and Seaton, who circulated the "go away letter," were members of the "magnificent seven" who, as agents of Respondent, circulated the decertification petition the year before. I conclude that they continued to act as Respondent's agents when they circulated the "go away" letter. Additionally, considering the Respondent's previous unlawful actions aiding the circulation of the decertification petition, and the other unfair labor practices discussed below, I conclude that providing Betterley and Seaton with a letter for employees to sign was not merely "ministerial aid" but was a part of Respondent's continuing effort to rid itself of the Union.

Moreover, although an employer does not violate the Act simply by offering an employee "ministerial aid," its actions must occur in a context free of coercive conduct. The Board has held that the essential inquiry is whether the preparation, circulation, and signing of a petition (or in this case, letter) constitutes the free and uncoerced act of the employees concerned. *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985); *Vic Koenig Chevrolet*, 321 NLRB 1255, 1259 (1996).

Accordingly, I recommend that the Board find that Respondent violated the Act, as alleged in complaint paragraph 8.

Complaint Paragraphs 9(a) and 9(b)

Complaint paragraph 9(a) alleges that on or about dates in June and July 2013, including on about June 24, 2013, the Respondent, by Darrell Anderson and Jeff Gasparini solicited employees to sign the "go away letter" described above. Complaint paragraph 9(b) alleges that on or about dates in June and July 2013, including on about June 24, 2013, Anderson and Gasparini threatened employees with unspecified reprisals if they did not sign. The Respondent has denied these allegations.

The General Counsel relies, in part, on the credited testimony of employees Leonard Timothy Vera and Patrick Myers, discussed above. Vera testified that Gasparini approached him and said it would be in Vera's best interest to sign the petition which was going around. From the record, it appears clear that Gasparini was referring to the "go away letter" which Betterley and Seaton then were circulating.

Similarly, Myers described a separate instance when Gasparini approached him and said essentially the same thing, that it would be in Myers' best interest to sign the petition. Based on my observations of the witnesses, I have credited Vera and Myers and find that Gasparini made the statements they attributed to him.

The Board has long held that the standard to be used in analyzing statements alleged to violate Section 8(a)(1) is whether they have a reasonable tendency to coerce employees in the exercise of their Section 7 rights. Intent is immaterial. The Board considers the totality of circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries, Inc.*, 336 NLRB 133 (2001); *Concepts & Designs*, 318 NLRB 948, 954, 955 (1995); *Puritech Industries*, 246 NLRB 618, 622–623 (1979).

Here, the circumstances include other unfair labor practices, such as the Respondent's participation in the circulation of the 2012 decertification petition and its ongoing participation in the circulation of the "go away" letter. The circumstances also include the fact that a high ranking official of the Respondent, its vice president and general manager, made the statements alleged to be violative.

Clearly, telling employees that it would be in their best interest to sign a letter disavowing support for the Union has a reasonable tendency to coerce employees in the exercise of Section 7 rights. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(1) of

the Act by the conduct alleged in complaint paragraphs 9(a) and 9(b).

Complaint Paragraph 10(a)

Complaint paragraph 10(a) alleges that on or about January 1, 2013, Respondent eliminated the paid Gold's Gym benefit offered to unit employees. Respondent has denied this allegation.

Complaint paragraph 10(c) alleges, and Respondent admits, that the Gold's Gym benefit relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subjects for purposes of collective bargaining. However, Respondent denies that it eliminated the Gold's Gym benefit without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent about the decision and its effects, as alleged complaint paragraph 10(d).

It is undisputed that before January 1, 2013, the Respondent would pay the fees for an employee and one member of the employee's family to use Gold's Gym. From the record, I infer that Gold Gym billed the Respondent directly.

The parties discussed the gym benefit during negotiations for an initial collective-bargaining agreement. On August 9, 2012, the Union submitted a proposed "Article 22, Incentives." This proposal included the following language:

> Free Fold [sic] Gym Membership for employees and a family member.

This language reflected the Respondent's then existing practice. When the Union did not receive a response to this proposal, it resubmitted the proposal on October 3, 2012. On October 17, 2012, the Respondent provided the Union with a counterproposal which stated, in relevant part:

> Free Gold Gym Membership for employees and a family member—Discounts starting in calendar year 2013 for gym memberships will be through the Vitality Program; going to the gym also earns employees points toward the Vitality program; we are not interested in continuing the Gold's Gym Membership going forward.

The "Vitality Program" is a wellness program which includes, among other things, paying for an employee's membership at one of the gyms affiliated with the program, or reimbursing the employee's gym fee up to a maximum of $200 per year. Testimony of Senior Human Resources Representative Norman Fulmer indicates that the Vitality Program tries to encourage certain behaviors considered healthy, such as working out at a gym, by awarding points for such activity and then allowing the points to be redeemed, either for merchandise or lower insurance premiums. However, Fulmer's testimony did not provide specific details apart from those relating to gym membership.

When the Union received the proposal, Business Agent Gary Kaleskas said "we don't

agree to that" but then caucused with the Union's bargaining committee. After the caucus, Kaleskas withdrew the Union's proposal. Kaleskas testified, in part, as follows:

> [A]fter talking with the committee, I came back out to them and told them I was going to withdraw my proposal based off our conversation that they would --before they changed any policies--or any of these incentives, rather, they would inform the local union, and we would be able to sit down and discuss any changes that they were making or proposed to make.

Although the Union withdrew its own proposal, it did not tentatively agree to the Respondent's proposal. Rather, the subject received no further discussion. On January 1, 2013, the Respondent implemented the Vitality Program and discontinued the Gold's Gym Membership program. Crediting Kaleskas' testimony, I find that Respondent did not notify the Union before making the change.

The Board has made clear that, to constitute a unilateral change that violates the Act, an employer's action must effect a material, substantial, and significant change in terms or conditions of employment. *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060, 1065 (2006); *Millard Processing Services*, 310 NLRB 421, 425 (1993); see also *Peerless Food Products*, 236 NLRB 161 (1978).

The Respondent contends that in this instance, the change is not material, substantial, or significant and that the employees suffered no loss. However, in the government's brief, the General Counsel advances the following argument:

> [A]lthough employees are able to get reimbursed for a membership to Gold's Gym, they are not able to obtain full reimbursement for a membership for an employee and a family member. Thus, for the annual membership cost of $320 for an employee and a family member, the maximum reimbursement that an employee could receive is $200 per year. Such change represents a material, substantial and significant change. In this regard, if all of the approximately 160 bargaining unit employees and a family member participate in the Gold's Gym membership benefit, Respondent's unilateral change represents a loss to the unit, as a whole, in the amount of approximately $19,200 for the cost of the benefit (160 unit employees multiplied by $120 reduction in reimbursement). Even if only half of the unit employees and a family member participate in the Gold's Gym membership benefit, Respondent's unilateral change represents a loss to the unit, as a whole, in the amount of approximately $9,600 for the cost of the benefit (80 unit employees multiplied by $120 reduction in reimbursement).

The General Counsel's argument suffers from a serious problem of proof. The record does not establish that the cost of membership for an employee and family member would be $320. Respondent objected, during the Union's cross-examination of its senior human resources representative, Norman Fulmer, that the $320 figure assumed a fact not in evidence, and I allowed the question only as a hypothetical.

The Union asserted in its brief that "Fullmer [sic] testified that membership in Gold's Gym cost $160.00 *per person*, or $320.00 for both an employee and a family member." However, the Union did not cite a transcript page and my review of Fulmer's testimony found no instance when he testified that the cost for both the employee and family member would be $320. That was the figure the Union used in its hypothetical question, but a hypothetical figure is, as the name implies, hypothetical.

Although it's possible that a family membership in a gym might cost twice as much as an individual membership, I do not feel comfortable simply assuming the fact without evidence. Moreover, the Vitality Program allows a participant to go to a number of different gyms including some affiliated with it. Presumably, some of those gyms are more expensive than others but the record does not reflect their costs.

There is insufficient evidence to establish whether there is a difference between the dollar value of the benefit, for employee and family member, under the old program and the comparable dollar value under the new program. Without this evidence, the General Counsel cannot carry the government's burden of proving that the change was material, substantial, and significant.

The record suggests that an employee may have some additional paperwork under the Vitality Program, having to apply for reimbursement rather than simply having the gym bill Respondent. However, the evidence does not establish whether this burden is substantial or de minimis. Additionally, since some gyms are affiliated with the Vitality Program, those gyms may have a different arrangement for paying. Based on the present record, I cannot conclude that the government has proven a material, substantial, and significant change.

Accordingly, I recommend that the Board dismiss the 8(a)(5) unilateral change allegation predicated on the allegations in complaint paragraph 10(a).

Complaint Paragraph 10(b)

Complaint paragraph 10(b) alleges that on about January 21, 2013, Respondent ceased sponsoring the participation of employees in the unit in Gasparilla events. Respondent has admitted this allegation. It also has admitted that the benefit is a mandatory subject of collective bargaining, as alleged in complaint paragraph 10(c). However, it has denied that it eliminated the benefit without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this action and its effects, as alleged in complaint paragraph 10(d).

As discussed above, at one time the Respondent paid the fees for its employees to participate in the Gasparilla parade, provided transportation to the parade, and furnished the employees with T-shirts to wear in the parade. The proposal which the Union tendered to the Respondent in August 2012 and again on October 3, 2012, titled "Article 22, Incentives," did not mention the Gasparilla event by name but it included two items which referred to it: "Entry fee paid for McKesson sponsored events" and "Bus Transportation to Action Team events." (The "Action Team," sometimes referred to as the "Activities Team," is an employee committee

which plans activities.)

The Respondent's October 17, 2012 counterproposal stated:

- Entry fee paid for McKesson sponsored events

  Again, we anticipate continuing our sponsorship of employees in some events during the year as in the past and will be based on business conditions.

- Bus transportation to Action Team events

  We have provided bus transportation in the past to McKesson sponsored events where there were a significant number of employees participating. It depends on employee participation.

As discussed above, the Union withdrew its proposal on October 17, 2012, after receiving the Respondent's counterproposal. However, the Union did not agree to the Respondent's proposal.

Respondent's former manager, Chudney Allen, testified that in late January 2013, she had a discussion with Director of Operations Thornton, who had become concerned about the amount of money Respondent had spent on the Christmas party:

> A. We had spent well in excess over the amount of money for the Christmas party. So, Cindy Thornton called me to her office and told me to propose, to the activities team, and ask them if Gasparilla was something that they want to participate in. And she gave me the figures for what we spent for the Christmas party.
> Q. Okay. And what, if anything, did you do then?
> A. So, I presented the figures, on the white board, up--in the upstairs conference room.
> Q. To who?
> A. To the activities team. Told them exactly how much we spent on the Christmas party and I asked if they would like to participate in Gasparilla. They voted no, because of the figures that were on the board.

Respondent argues that the Action Committee, not the Respondent, made the decision to cease supporting the Gasparilla event. Respondent's brief states, in part:

> The GC alleges that the Company had always sponsored the parade in the past and ceased doing so in 2013. However, the decision not to participate in 2013 was not a Company decision. A group of bargaining unit employees at the facility makes decisions as an "employee action committee," a committee that existed prior to the certification of the Union and of which the Union was aware. This group decides which fund-raising events to participate in and how certain

> budgeted items are going to be spent. The committee decides the participation in charitable events and organizes the holiday party. Towards the end of 2012, the committee decided to contribute more funds to the holiday party, in lieu of donating to the Gasparilla Parade. This was neither a management decision, nor a unilateral change.

However, the Union, in its brief, identified a fundamental problem with the Respondent's argument:

> Local 79 would point out that McKesson's defense to this allegation is somewhat unusual: it claims that it committed *different* violations of the Act from the violation which was alleged. While denying the "unilateral implementation" allegation McKesson asserts that it directly negotiated elimination of the Gasparilla Day benefit (in trade for a Christmas party) with employees on an "Action Team" or "Activities Team" (referred to by both names at the hearing) which consisted of bargaining unit employees and management representatives, and which McKesson had established before Local 79 was certified as the bargaining representative. Of course, dealing directly with bargaining unit employees while bypassing the certified union is a violation of Section 8(a)(5). . .

Although Respondent certainly has not admitted committing a direct dealing violation, it certainly has admitted, and indeed relied upon, the fact that its manager went to the employees on the Action Team, rather than to the Union, with its concerns about the expense of the Gasparilla event. Although, as discussed above, I denied the General Counsel's request that I find a direct dealing violation not alleged in the complaint, the inescapable fact remains that the Respondent went to an employee committee apart from the Union, and not to the Union, when it wished to stop paying for the Gasparilla event.

Respondent has admitted that its support for employees in the Gasparilla event is a mandatory subject of bargaining and I find that it was an established term and condition of employment at the time the employees selected the Union to represent them. Thus, the Union's proposed article 22, incentives, was in essence a proposal to maintain the status quo.

Moreover, I conclude that the discontinuance of its support for employees in the event—its ceasing to pay their fees to participate in the parade, its ceasing to provide transportation and T-shirts—is a material, substantial, and significant change in terms and conditions of employment. Indeed, Respondent's support for the employees participating in the event amounted to thousands of dollars.

Accordingly, I recommend that the Board find that Respondent violated Section 8(a)(5) and (1) of the Act by the conduct alleged in complaint paragraph 10(b).

Complaint Paragraph 11

Complaint paragraph 11(a) alleges, and Respondent admits, that on about May 22, 2013, Respondent discharged employee Kathy Culbert. Respondent has denied the allegation, in

complaint paragraph 11(b), that it did so because Culbert formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

The allegations in complaint paragraphs 10(c), 10(d), and 10(e)—that Respondent exercised discretion in deciding to discharge Culbert, that the discharge was a mandatory subject of bargaining but Respondent took this action without notifying and bargaining with the Union—concern a novel theory that a discharge can violate Section 8(a)(5) of the Act if the employer does not notify and bargain with the Union before acting. The General Counsel relies on the Board's recent decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), in which the Board announced this principle and also specified that it would be applied prospectively. The General Counsel's brief notes the following:

> *Alan Ritchey* was issued by a panel that under *NLRB v. Noel Canning*, No. 12-1281, 2014 WL 2882090, 199 LRRM 3685 (June 26, 2014) was not properly constituted. It is the General Counsel's position that *Alan Ritchey* was soundly reasoned, and the General Counsel therefore urges that Your Honor adopt the *Alan Ritchey* rationale and reasoning as set forth in that decision.

However, *Alan Ritchey* is unusual. It extended the existing case law enough that the Board decided to apply its holding prospectively. Now that this precedent has become invalid as a result of the Supreme Court's *Noel Canning* decision, I must follow the law as it existed before *Alan Ritchey* issued.

The judge has a duty to follow Board precedent as it exists. Certainly, the case law includes decisions in which the Board has found that a discharge of an employee violated Section 8(a)(5). See, e.g., *N.K. Parker Transport, Inc. and M.K Parker Transport, Inc., Successor & Joint Employers,* 332 NLRB 547 (2000). So, it could be argued that it would not be unfaithful to Board precedent to stretch it a bit to cover the present facts. However, I believe that, by applying its *Alan Ritchey* decision prospectively, the Board was indicating that this change in law was more substantial than the typical incremental way Board law, like the common law, evolves. Therefore, I will decline the General Counsel's invitation to boldly go where few, if any, judges have gone before.

On March 25, 2005, Respondent hired Kathy Culbert to work as a material handler and discharged her on May 22, 2013. She supported the Union's organizing campaign by attending union meetings and by wearing at work T-shirts bearing the union logo and the words “Power to the People.” Culbert testified that a supervisor saw her wear such a T-shirt. Moreover, Culbert's supervisor, Scott Garrett, testified that he knew she was a union supporter, although he denied that this fact figured in the Respondent's decision to discharge her.

During her 8 years as a material handler, Culbert worked in several different areas of the Respondent's facility and discovered that the amount of walking varied considerably. She quantified the amounts by wearing a pedometer. When working in the quality control department, called “Double Check,” Culbert did not have to walk at all. Work in the OTC Department (“over-the-counter” medications) required her to walk about 4 miles a day and work

in the RX area (prescription drugs) entailed walking about 14 miles per day.

The amount of walking is material because Culbert has medical conditions affecting her feet: Plantar fasciitis in both feet as well a bone spur in her right foot. For 4 years, she worked in the Double Check department and her job duties did not require walking. However, on April 11, 2012, Respondent reassigned her to the OTC department.

Culbert testified that her supervisor, Accino Hart, told her she was being transferred because she was not a "team player." He further explained that employees in Double Check said that Culbert "disappeared for 20 minutes at a time" and on one occasion refused to help a coworker, which Culbert denied.

This testimony stands uncontradicted and I rely on it in concluding that Hart made the statements Culbert attributed to him. However, although I find that Hart told Culbert that she "disappeared for 20 minutes at a time" and once refused to help a coworker, I make no findings regarding whether those statements are or are not true. Certainly, this testimony is not hearsay because Hart is Respondent's supervisor and agent. Nonetheless, in the absence of a way to assess the accuracy of the statements, I can come to no firm conclusion about their reliability.

Hart did not testify, which leaves unanswered some questions concerning the difference between what he told Culbert and what he later wrote in her performance appraisal. This evaluation covered the work period April 1, 2011, to March 31, 2012, but Hart did not give it to Culbert until August 14, 2012. Hart's comments on that appraisal include the following:

> When it comes to double check she is operationally sound. Her efforts definitely aid us in achieving not only accurate orders but also On Time truck departures.

Hart signed another appraisal which evaluated Culbert's performance for the period beginning April 1, 2012. He signed this appraisal on November 21, 2012, and Culbert signed to acknowledge receipt the next day. In this appraisal, Hart stated, in part:

> Kathy was removed from Double Check in April 2012 for failing to follow the Double Check SOP.

Hart's statement that Culbert was removed from Double Check for failing to follow SOP, standard operating procedure, conflicts with what he told Culbert on April 11, 2012, that she was reassigned because she failed to be a "team player." Additionally, Hart's statement in the November 21, 2013 appraisal would appear inconsistent with his remark in the previous appraisal that she was "operationally sound."

Arguably, Culbert's performance could have changed between the appraisal period ending March 31, 2012, and the one starting April 1, 2012. However, during this latter appraisal period, Culbert worked in Double Check no more than 11 days because the Respondent transferred her out of that department on April 11, 2012.

In November 2012, Respondent reassigned Culbert from the OTC area to the RX area,

where her daily walking increased to about 14 miles a day. It had been only 4 miles a day when she worked in the OTC area, so her daily walking almost tripled. As noted above, Culbert suffers from medical conditions which make walking painful. Working in the RX area, she had difficulty meeting the Respondent's production standards.

Technology enables Respondent to keep detailed statistics on each employee's job performance. A material handler wears a wireless computer on her arm. It instructs her to pull specified products for shipment to a customer and measures how long it takes her to do so. Respondent compiles this statistical information and posts it so that each employee can tell whether he or she is meeting the standards. Respondent also disciplines and discharges employees who fail to meet standards.

Because Respondent posts the statistical information, Culbert knew that her production did not meet Respondent's standards and that unless they improved, she could be disciplined and ultimately discharged. However, her medical conditions made it difficult, perhaps impossible, for her to meet Respondent's standards while assigned a job requiring her to walk 14 miles a day.

Within the RX area, the difficulty of individual job assignments varies. Culbert requested an easier job assignment but did not receive it.

Not receiving an easier assignment within RX, Culbert went to Manager Allen and asked if she could transfer back to the OTC area. Allen said she would look into it. Allen's testimony describes what happened next:

> Q. Okay. And did you respond to Ms. Culbert's request?
> A. I told her that I would take her request down, and the very next day, at my five o'clock meeting I would have a conversation with Jeff McCoy.
> Q. Okay. And did that happen?
> A. It did. I had a conversation with Jeff McCoy. He told me no, she was a devote union employee--she was a devote union employee and she would taint our new hire pool up there, plus our part-timers. No, she was going to stay downstairs on the C-side and that's where I left her.

McCoy, as assistant director of operations, was above Allen in the chain of command and immediately below Thornton, to whom he reported. McCoy emphatically denied telling Allen that he would not transfer Culbert back to the OTC because she was a union supporter or "black shirt." However, for the reasons discussed above, I credit Allen's testimony rather than McCoy's, and find that McCoy did make the statement which Allen attributed to him.

In finding that McCoy did say that Culbert was a "devote[d] union employee" who would "taint our new hire pool," I note that his refusal to allow her to return to her previous assignment furthered Respondent's campaign to decertify the Union. Stated another way, the record does not reveal a logical reason for this refusal apart from the unlawful antiunion effort. Thus, if Respondent were only interested in achieving its production goals rather than in decertifying the Union, it logically would have placed Culbert in a position where she could make those goals rather than keeping her in a job where she could not give Respondent the production it expected.

However, there is evidence that Respondent gave its goal of getting rid of the Union a higher priority than production. As noted above, Vice President Gasparini had instructed Manager Allen to assign Pam Seaton—one of his "magnificent seven" involved in the decertification effort—to work in different specified areas. On one occasion, Allen delayed following this instruction and Gasparini was not happy. Allen testified:

> The next day he met with me to let me know that when he makes a request, he expects for it to be honored. I said, well, it was the--the choice between making a truck late and placing Pam in the area which you wanted her. He said, let the truck be late. And I said okay, no problem.

McCoy's refusal to allow Culbert to return to her previous job assignment similarly makes sense if the goal of ousting the Union trumped other considerations. However, to fully appreciate why Respondent would fear that Culbert's transfer could harm its decertification effort, we must consider how frustrated Respondent became when that effort failed to bear immediate fruit. Understanding Respondent's impatience requires a brief review of how events unfolded.

Nicole Meyers, one of Gasparini's "magnificent seven," had filed the decertification petition on October 16, 2012, and the Region had docketed it as Case 12–RD–091338. However, this petition did not lead to an immediate election. Instead, the Region was holding the petition in abeyance because the Union had filed "blocking" charges and no election would be conducted until the unfair labor practice issues were resolved.

Respondent's frustration at the indefinite delay became apparent in the "go away" letter it drafted for employees to sign and send to the Union. This letter, discussed above in connection with complaint paragraph 8, noted that the Union had filed four unfair labor practice charges and then declared, "Enough is enough. Either the decertification vote should go forward, or Local 79 should leave us alone and let the NLRB know that it is not interested in representing us."

Respondent's testiness is understandable if it believed, quite plausibly, that the indefinite delay worked in the Union's favor. Even if it had the votes to win an election right then, the delay caused by the blocking charges gave the Union the opportunity to woo voters. New employees, who had not yet taken sides, would be particularly open to the Union's solicitations. In this light, McCoy's concern that the prounion Culbert would "taint" the new hire pool and part timers is easy to understand. However, I do not conclude that this concern was the *only* reason for Respondent's treatment of Culbert. In any decertification election Culbert almost certainly would be a vote for the Union, that is, if she remained an employee.

After Respondent denied Culbert's request to return to her previous job assignment, she continued to have problems meeting production standards. On March 5, 2013, Respondent issued her a final written warning.

Culbert then went to Operations Manager Darrell Anderson to ask about openings on the day shift, which she believed to be easier. According to Culbert, whom I credit, Anderson said that he had just discharged an employee for attendance problems but that they did not plan to fill the position. Anderson did not testify.

Culbert continued to work in the RX area until Respondent discharged her on May 22, 2013. Respondent asserts, as the reason for Culbert's discharge, her failure to meet a production standard called "Defects Per Million Opportunities" or "DPMO."

Respondent's discharge of Culbert clearly constituted an "adverse employment action," as that term is used in Board law. To analyze whether the discharge violated Section 8(a)(3) of the Act, I will follow the framework the Board set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that an employee's union activity was a motivating factor in the Respondent's taking action against her. The General Counsel meets that burden by proving union activity on the part of the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted).

If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007). However, a finding that an employer's ostensible reason for a discharge is pretextual defeats any attempt by the employer to show that the discharge would have occurred in the absence of protected activity. *Rood Trucking Co.*, 342 NLRB 895, 898 (2004); *Austal USA, LLC,* 356 NLRB No. 65 (2010).

Clearly, Culbert engaged in union activities, including wearing a T-shirt with the Union's logo while at work. Supervisor Scott Garrett admitted that he knew about Culbert's support for the Union, although he denied that such support factored into the discharge decision.

Other evidence of Employer knowledge includes the credited testimony of Manager Allen. Her testimony also establishes that the Respondent harbored antiunion animus and, more specifically, animus which management took into account when making decisions about Culbert. Thus, Allen credibly testified that Assistant Director of Operations McCoy refused Culbert's request to return to her previous job assignment because Culbert was a devoted union supporter and would "taint" the new hire pool and the part timers.

Accordingly, I conclude that the General Counsel has proven all the *Wright Line* elements necessary to establish that Culbert's union activities were a motivating factor in Respondent's decision to discharge her, shifting the burden of proceeding to the Respondent to demonstrate that it would have discharged Culbert in any event, even if she had not engaged in any protected activity. For reasons discussed below, I conclude that Respondent's stated reason for discharging Culbert is pretextual. As the Board stated in *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), where the evidence establishes that the reasons given for the Respondent's actions are pretextual—that is, either false or not in fact relied upon—the

Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.

However, even if I did not find the Respondent's asserted reason to be a pretext, I would conclude that Respondent did not carry its burden of showing that it would have discharged Culbert in any event, even in the absence of protected activity. It is true that Respondent submitted evidence that it had discharged another employee, Garrett Ward, for a similar failure to meet the DPMO standard. Such evidence would help Respondent carry its burden, indeed might suffice, if Ward and Culbert were similarly situated, but I am not convinced that the record includes all the information needed to reach that conclusion.

For one thing, Respondent could not produce a termination document ("Notice of Disciplinary Action") similar to that it produced for Ward's discharge. Additionally, Supervisor Garrett testified that he did not bring to the hearing certain documents associated with the termination of Culbert's employment. Before Culbert's discharge, Garrett communicated by email with a representative in Respondent's human resources department. On cross-examination, Garrett testified in part as follows:

Q. And where are those documents?
A. Which documents?
Q. The second checklist you had to fill out.
A. The checklist, I have --I have those documents.
Q. Pardon me?
A. I have the documents.
Q. You don□t have them with you here today, I assume, correct?
A. No.

Without seeing those documents it is not possible to ascertain whether Respondent included copies of them in the documents it produced pursuant to the General Counsel's subpoena. Moreover, I would be reluctant merely to assume that they had been produced.

There is another reason why I hesitate to conclude that Culbert and Ward are similarly-situated employees. As noted above, credited evidence establishes that Culbert had a medical problem which made walking painful, that nonetheless Respondent assigned her to a job entailing walking 14 miles a day and refused her requests to be reassigned to an easier task. The record does not reflect that Ward had similar medical problems or made requests for a different assignment.

The credited evidence does not establish that Respondent had a general policy to deny transfer requests made by employees with medical problems. However, Culbert's uncontradicted testimony does establish that a position had become vacant on the day shift because Operations Manager Anderson had discharged an employee.

Culbert had worked for Respondent for 8 years. Considering how rigorously Respondent applies its production standards, it seems clear that if Culbert had been unable to meet them while working in other areas of the plant, she would have been discharged much earlier. Therefore, it is reasonable to assume that had Culbert been allowed to transfer to one of the positions she held earlier, she could have met the standards. In these circumstances, Respondent's refusal to transfer Culbert because her prounion views could "taint" other employees makes any comparison of her work with other employees problematic.

In sum, were I to consider whether Respondent met its rebuttal burden, I would conclude that it did not. However, I do not reach that issue because of my conclusion that the Respondent's asserted reason for discharging Culbert was pretextual. *Golden State Foods Corp.*, above.

It should be noted, though, that the pretext here differs somewhat from the stereotypical conception of a "pretext," namely, an ostensible reason that isn't true or on which the employer did not rely. In the Culbert discharge, Respondent's asserted reason—failure to meet production standards—was, in one sense, true. Culbert indeed failed to meet the production standards. However, the Respondent, motivated by antiunion animus, brought about this shortcoming by assigning Culbert to a task it knew she could not do and by refusing to change this assignment.

Thus, even though Culbert did not meet the standards, the Respondent's asserted reason for discharging her, i.e., not meeting the standards, is deceptive because it does not disclose Respondent's role in causing Culbert to fall short, nor does it disclose Respondent's antiunion motivation. In *Sunshine Piping, Inc.*, 351 NLRB 1371 (2007), an employer reassigned an employee who had just testified in a Board hearing to a task the employee previously could not do. The Board adopted "the judge's findings that the Respondent's asserted reasons for issuing the performance-based discipline were pretextual, that antiunion animus motivated the Respondent to issue this discipline, and that the Respondent thereby violated the Act." 351 NLRB at 1373.

Therefore, I conclude that the asserted reason falls within the definition of "pretext" and precludes consideration of Respondent's rebuttal evidence. Additionally, I recommend that the Board find that Respondent, by discharging Culbert, violated Section 8(a)(3) and (1) of the Act.

Complaint Paragraph 12

The various subparagraphs in complaint paragraph 12 pertain to Respondent's discipline and discharge of employee Glenn Gray. Complaint paragraph 12(a) alleges, and Respondent admits, that on about May 2, 2013, Respondent disciplined Gray. Complaint paragraph 12(b) alleges, and Respondent admits, that on about September 5, 2013, Respondent disciplined Gray.

Respondent has denied that it suspended Gray on November 12, 2013, as alleged in complaint paragraph 12(c) but it has admitted that it discharged Gray on November 13, 2013, as alleged in complaint paragraph 12(d). Based on Respondent's admissions, I find that the government has proven the allegations raised by complaint paragraphs 12(a), 12(b), and 12(d).

Complaint paragraphs 12(f), 12(g), and 12(h) allege matters the General Counsel would need to prove to establish that Gray's discharge violated Section 8(a)(5) of the Act under the principles expressed by the Board in *Alan Ritchey*, above. The Supreme Court's recent decision in *Noel Canning*, above, resulted in the invalidation of this precedent. For the reasons discussed above, I do not believe that extant Board law would support the *Alan Ritchey* theory and therefore do not find an 8(a)(5) violation.

Complaint paragraph 12(e) alleges that Respondent disciplined Gray on about May 2, 2013, and September 5, 2013, suspended him on November 12, 2013, and discharged him on November 13, 2013, because Gray formed, joined, and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Respondent has denied this allegation. Before addressing these individual allegations, I will describe Gray's protected activity, which is extensive.

Gray's Protected Activity

Glenn Gray began working for Respondent in July 2003 as a material handler. In 2011, he and five other employees formed the nucleus of an effort to obtain union representation. Gray wore Union T-shirts and lanyards to work, which identified him to supervisors as a union supporter.

On one occasion during the union organizing campaign, Respondent's director of operations, Cynthia Thornton, spoke to Gray while they were in the break room. Gray credibly testified that Thornton said that she had heard that Gray "was doing house calls and talking to people about the Union and handing out flyers." Gray did not deny his involvement in the organizing effort but instead replied to the effect that they were allowed to distribute union literature in nonworking areas such as the break room and the parking lot.

According to Gray, sometime in 2011 after the election, Operations Manager Darrell Anderson, the supervisor of Gray's immediate supervisor, brought up the Union. Gray testified:

> [H]e had called me in his office and told me that he knew that I was responsible for bringing the Union in and I said, okay. I said--I said, what about it. And he had said that, I appreciate how you handled it, you didn't cause any work stoppages, any slow-downs and you handled this thing in a professional manner. And he said, I just want to let you know--and I'm quoting him--he said, "I don't give a shit about the Union, but I appreciate how everything went down," and that was--that was--that was pretty much it on that--on that occasion.

Anderson did not testify. Crediting Gray, I find that Anderson made the statement Gray attributed to him.

Gray also was a member of the Union's bargaining committee which had met with the Respondent's bargaining committee 34 times before Gray's discharge, the last of those meetings on the day of that discharge. Accordingly, there is no doubt that Respondent knew of his Union activities.

Gray also spoke out to voice other employees concerns at work. Thus, he testified:

> Q. Did you engage in any workplace activity in support of other employees?
> A. Yes, sir.
> Q. Okay.
> A. I was pretty vocal in the shift start-up meetings that we would have Monday, Wednesday, and Friday of every day of the week, and a lot of the associates were afraid to speak up, so they would filter questions through me.
> Q. What do you mean by that?
> A. They would--if they had any problems within the warehouse, a lot of them were scared to speak up and management would tell them, you guys have a right to speak up, but a lot of them were afraid to. So they saw how vocal I could be, as far as voicing my concerns on what was going on in the distribution center, so they would, you know, filter them through me, but I told them, I said--
> Q. When you say "filter," what do you mean, they would ask you?
> A. They would tell me some of the problems that they were--you know, were afraid to approach management with.
> Q. Okay. And did you do that?
> A. Yes, sir.

The record leaves no doubt that management took note of this protected activity. Gray's immediate supervisor, Elieser Nieto, made the following observation on Gray's May 6, 2013 performance appraisal: "Glenn is always the voice for other employees that do not have the courage to speak up."

Considering the Respondent's implacable desire and persistent efforts to decertify the Union, it may seem odd that Gray's immediate supervisor would praise Gray's concerted activity in speaking up for other employees. One explanation might be that the supervisor did not associate Gray's protected activity, in speaking up for other employees, with union activity.

However, as discussed above, Operations Manager Anderson praised Gray for the "professional manner" in which Gray conducted *union* activity. That does indeed sound unlikely in view of Respondent's antiunion efforts. Part of the explanation may be that the animus came from the top down and had not trickled to the level of first line supervisors and their immediate superiors. For example, certain 8(a)(1) allegations in this case arise from statements made by the Respondent's vice president and general manager, the highest-ranking official at the facility.

It is true that complaint paragraph 9 alleged 8(a)(1) violations both by Vice President and General Manager Gasparini and by Operations Manager Anderson, but the evidence only established that Gasparini engaged in the unlawful conduct. Moreover, the entire record left me with the impression that Anderson generally was sympathetic to employees. He would follow orders from above but his heart wasn't in it. When it came to the Union, Anderson didn't really

(to paraphrase his more colorful language) care. Respondent did not call Anderson as a witness.[3]

Moreover, Gray has an exceptionally warm and winning personality, abundantly evident on the witness stand, and he appeared to take care not to give offense. My observations while he testified lead me to believe that to arouse someone's anger, Gray would have to do something rather extreme, such as drop a brick on the person's toe or, if the person were Respondent's chief executive officer, make uncomfortable statements to him while the shareholders and news media watched.

On July 31, 2013, Gray did the latter. At this point, the Union had been bargaining with the Respondent for more than a year and a half—the first negotiating session was on January 25, 2012—but had not reached agreement on a first contract. The Union decided to send a delegation to the Respondent's stockholders meeting in San Francisco, and Gray was one of the delegates.

The Union's purpose, as described in a subsequent Teamsters' publication, was to protest the chief executive officer receiving a pay package which the Union considered excessive when compared to the employees' wages. The publication stated, in part:

> This week, shareholders said "no more" to a pharmaceutical distribution company lavishing extravagant wages on its CEO while paying its workers so little they can't afford health care.
>
> At the McKesson annual meeting in San Francisco, shareholders sent a resounding message that they've had enough with the company's excessive pay packages for its CEO. A majority vote by the shareholders rejected the CEO's compensation package and approved a shareholder proposal to strengthen the executive pay claw back policy. A claw back allows a company to reclaim an executive's incentive compensation if the company suffers significant financial harm.

[3] Quite possibly, Anderson might have given testimony harmful to Respondent's case. Allen recounted information she had learned from Anderson which would provide additional evidence of Respondent's antiunion animus.

According to Allen, an employee, Estra Contave, complained to Anderson that he, Contave, should have received a larger raise. When Gasparini learned about this dissatisfaction, he gave a copy of the decertification petition to Anderson and told Anderson to tell Contave that he signed the petition he "could get his money." Anderson relayed this information to Contave, but Contave would not sign the petition.

Allen gave much of this testimony before Respondent raised a hearsay objection. I concluded that the testimony was not hearsay because Respondent had admitted that Anderson was its supervisor and agent. Anderson's out-of-court declarations, therefore, would be admissions by a party opponent under Rule 801(d)(2) of the Federal Rules of Evidence. However, even if not hearsay, and even though I consider Allen's testimony highly reliable, second hand information inevitably suffers some transmission loss. Because neither Anderson nor Contave testified, there was no good way to determine what weight should be given to the information. Therefore, I have not relied on it in making the findings and conclusions in this decision.

> McKesson has had to pay out nearly a billion dollars to settle allegations of price fixing and Medicaid fraud. The scandal happened during John Hammergren's tenure as chief executive. Still, the board richly rewarded him with roughly $50 million a year in total compensation. His pension, valued at $159 million, is likely the highest for any executive in history according to compensation consultants interviewed by the Wall Street Journal.
>
> Perhaps even more shameful than the CEO's pay is the workers' pay. Glenn Gray, a 10-year McKesson employee from Lakeland, Fla., stood up at the meeting to tell the CEO that the pay for McKesson workers in his distribution center is so low that many of his co-workers cannot even afford to pay for their healthcare. "Most cannot even afford to set aside one percent of their paycheck into their 401(k)," he said.

The Union publication included a photograph of Gray, wearing a business suit and holding a microphone. It also included a photograph of union protesters outside the stockholders meeting. Some held signs stating:

McKESSON

BAD

MEDICINE

FOR

WORKERS

Others in the photograph held a larger banner stating

McKESSON

BAD MEDICINE

FOR AMERICA

Gray's speech received wider coverage than just the union publication. Reporters from the *Wall Street Journal* also attended Respondent's shareholders meeting. They interviewed Gray after he spoke and quoted him in an article which appeared in that newspaper. Clearly, at this point, even Respondent's chief executive officer had knowledge of Gray's protected activities.

Nothing in the record suggests that Gray's presence at the stockholders meeting was disruptive. He testified that he "had been given" 3 minutes to speak and, in the absence of any

evidence to the contrary, I infer that the Union had requested and been given time for this brief presentation.

Likewise, nothing in the record suggests that Gray was intemperate in any way. Gray testified that he "just spoke to Mr. Hammergren, in general, about the conditions of the Lakeland, Florida distribution center and how we were being treated there. You know, things along those—nothing derogatory. Just expressing to him that the . . .people in the bargaining unit feel we were underpaid and, you know, people there can't afford health insurance."

Other evidence is consistent with Gray's testimony that he said "nothing derogatory." Gray's "talking points" indicate that he identified himself as a McKesson employee and continued as follows:

> I work in the Lakeland distribution center where most workers make between $13-15/hour and then have to deduct nearly a third of our monthly pay check just to afford health coverage. Honestly, many can't make ends meet. I'd like to know when setting our CEO's pay—which has averaged about $50 million a year, whether any consideration is given by the compensation committee to the ratio between his pay and the average worker. I'd like to know whether or not you think that matters. I'd like to know whether you think it is important to send a message throughout the company that McKesson's success is a result of one man's effort or a team effort throughout the company. I will tell you that for front line workers who lost their pensions after an accounting scandal decimated our finances, it is demoralizing to know that $159 million pension is awaiting the one man in our company who can actually afford retirement.

As the name suggests, those "talking points" presumably reflected the points the Union wanted Gray to make and certainly are not a verbatim report of what he actually said. However, Gray's description of his actual speech suggests it was milder than the talking points. He paraphrased part of it as follows:

> A lot of the associates in there don't have health insurance, for one thing. A lot of the associates can't even afford to contribute one percent of their paycheck toward a 401(k) plan. And I'm just here asking if you can assist us with making the quality of life better for myself as well as my fellow coworkers back in the distribution center. And he assured me that he would do all he could to rectify that and to work with the Union to do that, as well as I had asked him if he could, you know, help rectify this contract, because I said we been in negotiations so long and why it's--it's taking us a quite a long time to acquire a union contract when there are other McKesson DCs who have them.[4]

Based on this testimony and the related evidence, I conclude that Gray neither said nor did anything which might cause him to forfeit the protection of the Act. Additionally, Gray's testimony indicates that his speech drew a polite response from the chief executive officer:

[4] From context, I infer that the term "DCs" refers to distribution centers.

> And he said he'll keep the relationship alive. He said that--told myself and [Teamsters Local 79 President] Ken Wood that, I'm going to do all I can to keep the relationship with the Union strong and that I'll help you guys all I could. He gave us his word. I said, well, I appreciate that, Mr. Hammergren . . .Very nice man. And he said--at the end of the discussion he said, I appreciate your candor and expressing the views of what's going on in Florida, and that was pretty much it.

Gray appeared quite sincere when he testified that Respondent's chief executive officer was a "very nice man." He did not have to make such a remark and it seemed unexpected coming from someone who had been discharged, but I detected neither bitterness nor intent to exaggerate in Gray's testimony, which I credit.[5]

In sum, I conclude that Gray was polite and respectful when he addressed the CEO at the shareholders meeting. Nonetheless, and even though Gray spoke for only 3 minutes, I believe that the CEO would not be likely to forget Gray's appearance. According to the Union publication, the shareholders rejected the compensation package proposed for the CEO and also strengthened a provision to "claw back" part of his compensation under certain circumstances. Being denied an expected raise would make the day even more memorable to the CEO than the Union's signs stating that McKesson was "bad medicine."

About a week after the stockholders meeting, Director of Operations Thornton came up to Gray at work and mentioned his speech. Gray credibly testified that Thornton said that she had not known that he would be going to the meeting, "and I hear you spoke really well, very eloquently, you know, it was a good meeting, things along those nature, you didn't say anything derogatory, you know, we were shocked to hear that you went, things along those lines."

Several days later, Vice President and General Manager Gasparini saw Gray in the break room, mentioned Gray's speech and kidded Gray about the *Wall Street Journal* misspelling Gray's name. Nothing in this conversation, as Gray described it, suggested any hostility or ill feelings.

Subsequent Adverse Employment Actions

These conversations with Thornton and Gasparini took place sometime during the first part of August 2013. On September 5, 2013, Gray received disciplinary action which, although designated a "verbal counseling," was memorialized on a "Corrective Action Form" which stated, in part:

> On 8/30/2013 Glenn Gray took a 31 minute lunch. Day shift associates are allowed a 30 minute lunch. This 31 minute lunch that occurred is a violation [of]

[5] Gray's demeanor on cross–examination also impressed me. When Respondent pointed out mistakes in his pretrial affidavit, Gray freely admitted he had made errors which he did not catch when he reviewed the affidavit before signing. These mistakes typically concerned when certain events happened, and it seems clear from all of Gray's testimony that his recollection of precise dates could be better. However, from all of his testimony and particularly his demeanor on cross-examination, I conclude that Gray took his obligation to tell the truth very seriously and neither fabricated nor embellished any facts.

McKesson Lakeland's local work rules.

This warning for a 31-minute lunch also included the following language:

> Glenn Gray, you will need to make a conscious choice about whether you are willing to do what it takes to meet these stated expectations. If you fail to improve to the level expected, it will lead to further action, up to and including the termination of your employment with McKesson. . .

Complaint paragraph 12(b) describes this discipline, which Respondent admits, and complaint paragraph 12(e) alleges that Respondent imposed the discipline because of Gray's union activities, which Respondent has denied. These allegations will be discussed further below under the heading "Complaint Paragraph 12(b)."

On November 12, 2013, the Respondent suspended Gray and the next day discharged him, ostensibly for "stealing company time." These matters will be discussed below in connection with complaint paragraphs 12(c) and 12(d). However, complaint paragraph 12 also includes an allegation relating to discipline imposed before Gray's appearance at the shareholders meeting. For clarity, I will consider the allegations in the order they appear in the complaint.

Complaint Paragraph 12(a)

Complaint paragraph 12(a) alleges that Respondent disciplined Gray on about May 2, 2013, which Respondent has admitted. Complaint paragraph 12(e) alleges that Respondent imposed this discipline because of Gray's Union and protected concerted activities, which Respondent denies.

This complaint allegation concerns a "documented discussion," or oral warning, which Gray received on May 2, 2013 for taking a 33-minute lunch rather than the 30 minutes Respondent allowed. Gray's testimony indicates that he believed he had received permission to exceed 30 minutes when necessary to care for his wife, who has lupus. Therefore, I will begin by describing earlier events which led Gray to have this belief.

In January 2013, Gray had become concerned when he learned that the Respondent was going to implement a new, stricter policy requiring employees not to exceed 30 minutes for lunch. On occasion, Gray might have trouble complying with this policy because he is the sole caregiver for his wife, whose symptoms vary in severity. Gray had a practice of telephoning his wife at lunch to find out about her condition and then, if necessary, going home to help her. Gray testified that he went to Operations Manager Anderson to discuss the matter:

> And what happened was, after I explained it to him, I said, I know you guys are implementing a new policy about people coming back from lunch late, and I said, I respect that, I have no problem there with that. I said, but you guys know I go home and check on my wife, and you grant me time and I appreciate that. I said, is there any way you guys can help me, because— I said, I try to do as much as I can on my lunch break to keep from interfering with work. And he suggested to

> me, he said, well, what I'll do is I'll let this one go and we won't write you up for it, but what I would suggest to you is you go on FMLA. And I said, Well, how will that help me. He said, FMLA will—if you go one it and you get the paperwork filled out, what it will do is it will stop —you'll be protected, first of all, from—you know, while you're out on your thirty-minute lunch break, so that you won't acquire write-ups or you won't, you know, potentially lose your job and you know, you'll have that protection. And I was like, well, I didn't know FMLA worked that way. And he said, yeah, it does.

Anderson did not testify. I credit Gray's uncontradicted testimony.

From context, it is clear that when Gray used the term "FMLA," he was referring to the federal Family and Medical Leave Act of 1993. It is not so clear that Anderson gave Gray correct information about how the program Respondent had established to administer such leave actually worked. Nonetheless, Gray reasonably relied on what Anderson told him. It certainly would be reasonable for Gray to presume that the operations manager would know how the Respondent's FMLA program operated.

Acting on Anderson's suggestion, Gray made the necessary application which, after some delay in processing, was granted. The record includes an August 15, 2013 letter from Cigna, the administrator of Respondent's FMLA program, which documents that the FMLA request had been approved for the time period February 22 through August 22, 2013.

It appears that, because of the administrative delay in processing, Cigna had not yet issued its approval of the FMLA when Gray received the May 2, 2013 "documented discussion." Gray's immediate supervisor, Elieser Nieto, issued this warning, which stated that on May 1, 2013, Gray had taken a 33 minute lunchbreak rather than a 30 minute lunchbreak as allowed.

After receiving this warning, Gray went to Operations Manager Anderson, who is Nieto's supervisor. Gray testified as follows about this conversation with Anderson:

> Q. Okay. And what was the substance of that conversation?
> A. It was about--it was about this write-up. And I had mentioned to him that I'm under FMLA waiting on approval. I'm just waiting until the approval process and, you know, to make sure that this is going to come of me. And he said, well, according to the way I hear FMLA works, that once Cigna approves it, if something happens in your case, it should be removed, and we're just waiting to hear the feedback. Because it was taking so long, I was like, well, what's taking so long for this thing to be approved. So he said, Well, once--he said, G, don't worry about it, once you get approved, that this will be removed. I said, okay, I was just checking.

As noted above, Operations Manager Anderson did not testify and Gray's testimony, which I credit, stands uncontradicted. Notwithstanding what Anderson told Gray, the Respondent did not remove the warning from Gray's record after the FMLA administrator approved Gray's FMLA request. Indeed, Gray's October 23, 2013 performance appraisal briefly

noted this warning. However, the complaint does not specifically allege a violation based upon Respondent's subsequent failure to rescind the discipline.

Rather, complaint paragraphs 12(a), 12(e), and 14, taken together, only allege that imposition of this May 2, 2013 discipline violated Section 8(a)(3) and (1) of the Act. The alleged violation arises from the imposition of this discipline rather than Respondent's later failure to remove it and it is not necessary for me to resolve the latter question.

However, the General Counsel has developed considerable evidence concerning Gray's FMLA leave, including introducing into evidence the letters approving the leave requests, and I must consider how this evidence relates to the issues raised by the complaint. The following argument in the General Counsel's brief suggests how the FMLA evidence fits into a *Wright Line* analysis:

> Respondent argued that it issued discipline to Gray on May 2, 2013 just as it had done with many employees. However, Gray's situation was different because he received retroactive approval to use FMLA to provide care for his wife during May 2013, and the discipline he received relate specifically to that issue. In this regard, manager Anderson and supervisor Nieto specifically told Gray that his discipline would be removed once he received FMLA approval, which occurred on August 15, 2013. At around that time, Gray spoke with Nieto, who confirmed that Respondent would remove the discipline because he had received approval to use FMLA.
>
> Respondent also argued that Gray had to call CIGNA himself to get FMLA approval for the late return from lunch incident on May 2, 2013. However, Anderson did not tell Gray that he needed to report that incident to CIGNA and Nieto specifically told Gray that he himself would contact CIGNA to determine whether Gray had approval to use FMLA. Thus, Respondent's argument is without merit and *reveals the pretextual and discriminatory nature of its actions against Gray*. [Italics added]

From the portion I have italicized, I gather that the General Counsel is arguing, in essence, that Respondent's disregard of Gray's FMLA leave is evidence of animus and pretext. The General Counsel's brief further addresses the Respondent's later failure to rescind the warning after it received the letter from Cigna approving Gray's FMLA request:

> Thus, Respondent's decision, to keep the May 2, 2013 documented discussion discipline in effect against Gray, reveals that it had an unlawful intent to discriminate against him because of his Union activities, in violation of Section 8(a)(3) of the Act.

The Respondent's brief does not take a position on how the FMLA evidence relates, if at all, to the allegations in complaint paragraph 12(a). In view of the General Counsel's arguments, I will consider the FMLA evidence in connection with the issues of animus and pretext.

Following the framework the Board described in *Wright Line*, above, I first will examine whether the General Counsel has established three elements: (1) union activity on the part of the employee, (2) employer knowledge of that activity, and (3) antiunion animus on the part of the employer. Proving these three elements establishes that the employee's union activity was a motivating factor in the decision to impose discipline. At this juncture, to avoid a finding that the discipline violated the Act, a respondent must show that it would have taken the same action in any event, even in the absence of protected activity. *Willamette Industries*, above.

The record establishes that Gray engaged in union activity. He participated in the group which began the Union's organizing drive, distributed T-shirts with the Union's logo and other union items, such as lanyards, and wore such T-shirts and lanyards at work. Moreover, his credited testimony proves that the Respondent's management knew about his union activity. For example, in 2011, after the Union won the election, Operations Manager Anderson thanked Gray for the "professional manner" in which Gray had handled the union organizing campaign.

The record also establishes abundant evidence of animus. As discussed above, management unlawfully assisted in circulation of a decertification petition and devised stratagems to make it easier for the circulators to solicit employees. The Respondent's top official at the facility unlawfully coerced employees to sign a letter telling the Union to withdraw its blocking charges or disavow its status as exclusive representative. The Respondent also chose to deal with an employee committee, rather than the Union, when it wanted to change a condition of employment, its support for employees participating in the Gasparilla parade.

However, none of this evidence indicates that the Respondent's management was hostile towards Gray at this point, on May 2, 2013. Although Respondent's management harbored ample animus the record does not suggest that it had turned its attention to Gray, who was a conscientious and productive employee, and well-liked.

Gray's May 6, 2013 performance appraisal—issued only 4 days after Gray received the disciplinary warning—revealed no hint of animus. To the contrary, Gray's supervisor wrote: "Thank you for your hard work and dedication it is greatly appreciated."

Accordingly, at this point in May 2013, I discern no management hostility of any kind directed specifically towards Gray. The General Counsel's brief argues that Respondent's disregard of Gray's FMLA leave, manifested by its refusal to rescind the warning even after receiving the Cigna letter approving the leave, constitutes evidence of animus. Considering all the circumstances, however, I cannot agree. In my view, the way the Respondent treated the FMLA matter says nothing at all about animus or the lack of it.

Certainly, crediting Gray's uncontradicted testimony, I find that Operations Manager Anderson told him "well, *according to the way I hear FMLA works*, that once Cigna approves it, if something happens in your case, [the discipline] should be removed, and we're just waiting to hear the feedback." (Italics added.) However, Anderson's understanding of the FMLA program was incorrect, or at least different from the way higher management understood it. The fact that higher management did not agree with Anderson's interpretation of FMLA rules does not reveal anything about whether management harbored hostility towards Gray because of Gray's Union

activities.

Apart from the FMLA matter, other circumstances do not suggest that antiunion animus motivated this particular warning. The complaint does not allege that Respondent's new, stricter policy was an unlawful unilateral change and I must assume it was properly promulgated. Moreover credited evidence does not establish either that Respondent instituted this particular policy to target union supporters or that Respondent singled out Gray for selective enforcement of the policy. Therefore, I find that it did not. Gray does not deny taking a 33 minute lunch on May 1, 2013, and I find that he did.

These findings appear consistent with a further finding that Gray's protected activity did not play a part in Respondent's decision to issue Gray the warning on May 2, 2013. However, in its recent decision in *Libertyville Toyota*, 360 NLRB No. 141 (2014), a Board panel majority stated:

> Contrary to the suggestions of the judge and our dissenting colleague, proving that an employee's protected activity was a motivating factor in the employer's action does not require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined "nexus" between the employee's protected activity and the adverse action.

360 NLRB No. 141, slip op. at 4, fn. 10 (citations omitted). Following this direction from the Board, I must conclude that Gray's protected activity was a motivating factor in the decision to discipline him. Although my review of the record does not discern specific facts which would suggest a connection between Gray's protected activity and the May 2, 2013 discipline, I believe that the Board's precedent establishes, in effect, an irrebuttable presumption.

Based on that presumption, I conclude that Gray's protected activity was a motivating factor, so I now consider whether Respondent has established that it would have taken the same action even if Gray had not engaged in protected activity.

The General Counsel argues that the Respondent's refusal to rescind the warning, even after receiving notice that Gray's FMLA request had been approved, constitutes evidence of pretext. Should Respondent's asserted reason for the warning prove to be pretextual, Respondent would be precluded from presenting rebuttal evidence to establish that it would have taken the same action against Gray even in the absence of protected activity. See *Golden State Foods Corp.*, above.

However, the General Counsel's argument does not explain how Respondent's later decision not to rescind the discipline could show that the explanation Respondent gave when it issued the discipline was not the real reason. Certainly, it could be argued that Respondent's later decision to leave the discipline in Gray's file represents a continuing fixed intent to discipline him no matter what. For that argument to be persuasive, there should be some other evidence that at least hinted that Respondent was gunning for Gray on May 2, 2013, when the discipline issued, but I have found none in the record.

Therefore, I reject the General Counsel's argument and conclude that the reason given for the discipline was not pretextual. Accordingly, I will consider the Respondent's evidence that it would have imposed the same discipline even in the absence of protected activity. That evidence concerns discipline Respondent imposed on other employees for similar tardiness.

The record establishes that on March 28, 2013, Manager Larry Angulo issued an oral warning to employee Tim Vera for taking a 33 minute lunch, and memorialized the warning on a form closely resembling the form which recorded Gray's May 2, 2013 oral warning. On March 29, 2013, Angulo issued a similar warning to employee Oveda Carswell for taking a 34 minute lunch. On April 5, 2013, issued a similar warning to employee Titus Lennon for taking a 33 minute lunch. On April 30, 2013, Angulo issued a warning to employee Cheryl Bailey for taking a 33 minute lunch. On April 11, 2013, Manager Joe Dunleavy issued such a warning to employee Ramiro Arteaga for taking a 33 minute lunch.

The record includes a number of other, similar disciplinary documents (including another warning to Lennon, for taking a 34 minute lunch) but the warnings described above are particularly relevant because they occurred before Gray received the warning on May 2, 2013. The record does not indicate that any of these employees, except Gray, engaged in union or protected concerted activities.

The evidence therefore establishes that Respondent did not single out Gray but treated him as it treated other employees in similar situations. Therefore, I conclude that Respondent has carried its burden of establishing that it would have given Gray the May 2, 2013 warning even if he had not engaged in protected activity.

Accordingly, I recommend that the Board dismiss the 8(a)(1) allegations arising from complaint paragraph 12(a).

Complaint Paragraph 12(b)

Complaint paragraph 12(b) alleges that on about September 5, 2013, Respondent disciplined employee Glenn Gray, which Respondent admits. However, Respondent has denied that it did so because Gray engaged in Union or other protected activities, as alleged in complaint paragraph 12(e). It also has denied that it violated the Act by issuing this discipline, as alleged in complaint paragraph 14.

On September 5, 2013, Gray's supervisor, Elieser Nieto gave Gray a warning which stated, in part, as follows: "On 08/30/2013 Glenn Gray took a 31 minute lunch. Day shift associates are allowed a 30 minute lunch. This 31 minute lunch that occurred is a violation McKesson Lakeland's local work rules."

Gray does not deny taking a 31 minute lunch. Rather, he believed, based on his earlier conversation with Operations Manager Anderson, that his FMLA leave gave him this leeway. Gray testified that he mentioned this leave to Nieto at the time of the warning:

Q. Did you respond to Mr. Nieto?
A. Yes, sir. I told him, I said, I am on FMLA and that protects me while on I'm on lunch break. I said, you remember now, Darrell had initiated this way back in the beginning of the year, for me to go on FMLA for protection so that I wouldn't get into trouble. I said, now this is the second time that I've been given one of these. I said, the first one was back in May, and now you've told me that that was removed. I said, why has it escalated to a verbal. He said, Well, I'm just doing what I'm told.

I said, okay. I said, can you, once again, check with Cigna to make sure I'm covered, and then I'll check back with you. And he said, yeah, he'll check with Cigna, and after a couple of days I'll check back with Eli. Eli said it was covered, that this would be removed from me.

Nieto did not recall Gray giving this explanation. He testified, in part, as follows:

Q. Did Mr. Gray ever indicate to you that the documented conversation that he received on that --in front of you sir was the result of that it should be expunged because he was actually out on FMLA taking care of his wife at the time?
A. No.
Q. Did you ever tell Mr. Gray that the documented conversation that's in front of you would be expunged from his file because you had determined that he was actually approved for FMLA on the day in question?
A. Not to my recollection, no.

For several reasons, I credit Gray's testimony rather than Nieto's. As discussed above, Gray's demeanor as a witness gives me considerable confidence that his testimony is reliable. Additionally, in this instance, Nieto's answer, "Not to my recollection," leaves open the possibility that he actually made the statement attributed to him but simply did not remember it.

Moreover, Nieto's supervisor, Operations Manager Anderson, told Gray essentially the same thing. After his discussion with Nieto, Gray went to Anderson. He described his conversation with Anderson as follows:

I mentioned to him that Eli gave me this verbal counseling and I said, you know, just remember the conversation we had way back when about me going on FMLA. He said, yeah, G, I'm the one that suggest to you to go on it. I said, yes, sir. And I said, I got one back in May about this.

He said, well, that ought to be off, shouldn't it. He said, I don't know, but remember--if you approved by Cigna, it should go away. And I said--and he said, now you coming back to me with another one. I said, yes, sir. I said, now this falls under my FMLA, as well.

And he said, well, I'll look into it, but, you know, it should come off of you if you covered. I said--I said, it should. So I said, because, you know me,

> man, I'm dedicated, I don't want nothing in my file, man. My file is empty. He said --he said, okay. And that was just --you know, I was just —any time like this is going on, you know, I'll bring it to his attention.

For reasons already discussed, I believe Gray's testimony is trustworthy. Additionally, Gray's testimony, quoted above, is uncontradicted. I find that Anderson made the statements Gray attributed to him.

Respondent contends that Gray's FMLA leave allowed him to take a longer lunch break if needed to care for his wife and *if he requested permission in advance*, but did not excuse his clocking in late if he had not sought such permission. Respondent's brief states, in part: "Gray had at times indicated he needed a longer lunch break and was permitted a longer break off the clock after receiving management approval."

From Gray's testimony, I conclude that his conversations with Operations Manager Anderson had led him to believe that the grant of FMLA leave allowed him to return from lunch late if he needed the extra time to take care of his wife. Gray's testimony suggests that Anderson believed this to be the case, and such an understanding is not obviously unreasonable. It might not always be possible for Gray to know in advance how long it would take to care for his wife, which depended on the severity of her symptoms that day. Gray's credited testimony suggests that Anderson also believed that when the FMLA leave administrator, CIGNA, approved Gray's FMLA leave, the warnings would be removed from Gray's record.

However, Cigna took a considerable time to process Gray's FMLA leave requests. As noted above, Cigna's letter approving FMLA leave for the period February 22 through August 22, 2013, was dated August 15, 2013, just a week before the end of that period. Cigna eventually approved Gray's FMLA leave request for a 1year period extending from February 22, 2013 to February 22, 2014, thus covering the time in September when he received the warning for clocking in a minute late from lunch, but Cigna did not notify Gray of this approval until more than a month later, by letter dated October 11, 2013.

There is a significant difference between Cigna's letter of August 15, 2013, and its letter dated October 11, 2013. The October 11 letter includes language not present in Cigna's earlier letter. This language instructed Gray on how the leave should be taken and included the following:

> When planning foreseeable medical treatment relating to your leave, you must consult with your manager and make every reasonable effort to provide notification for an absence in advance or as soon as practicable depending on your individual circumstances. You must also schedule your absences so that they do not unduly disrupt McKesson's operations, subject to the approval of the Health Care Provider. If you do not consult with your manager to make a reasonable attempt to arrange the schedule of treatments so as to not unduly disrupt business operations, McKesson may initiate discussions with you and require that you attempt to make such arrangements, subject to the approval of the Health Care Provider.

> If your need for absence is unforeseeable, you must follow McKesson's normal absence call-in procedures. If you fail to follow normal call-in procedures, except under extenuating circumstances, you may be subject to McKesson's disciplinary rules, and Federal and/or State FMLA coverage for any applicable absences may be delayed or denied until you comply with policy.

Arguably, this language in the October 11, 2013 letter would place Gray on notice that he had to call Respondent if his wife's condition required him to take more than a 30 minute lunch. Even so, he did not receive such notice until after the September 5, 2013 warning.

At the time of that discipline, Gray reasonably believed, based on the information Anderson had provided, that his FMLA leave allowed him to take more than 30 minutes for lunch if he needed that time to care for his wife. However, whether or not the discipline violated the Act turns not on Gray's belief but on Respondent's intent.

For the reasons discussed above with respect to complaint paragraph 12(a), I do not conclude that Respondent's refusal to excuse the tardiness based on Gray's FMLA leave reveals anything about whether Respondent harbored animus particularly directed at Gray.

Performing the same type of *Wright Line* analysis described above with respect to complaint paragraph 12(a), I must conclude that the General Counsel has established that Gray's protected activity was a motivating factor in the decision to discipline Gray. However, the record documents many instances in which the Respondent gave similar warnings to other employees who clocked in from 1 to 4 minutes late. Therefore, I conclude that Respondent has proven that it would have disciplined Gray in any event, even in the absence of protected activity.

The fact that Anderson led Gray to believe that his FMLA leave allowed him to take more than 30 minutes for lunch when needed raises a possibility which must be considered, namely, that Respondent "set a trap" for Gray by leading him to violate Respondent's rules while believing that he had permission to do so. Respondent's conduct in other instances affords reason to consider such a possibility seriously. For example, I have concluded that Respondent refused employee Culbert's request for a transfer because she supported the Union and then discharged her for a pretextual reason.

However, I do not discern in the record any evidence that Anderson was trying to mislead Gray. Rather, I believe it much more likely that Anderson truly understood the FMLA leave program to work in the way he described it to Gray. There is a difference between being mistaken and being Machiavellian and the present record provides little or no reason to suspect that Anderson was the latter.

Additionally, I do not believe that Respondent's later refusal to rescind the discipline constitutes very probative evidence of its motive when it imposed the discipline. According, I do not conclude that the September 5, 2013 warning was pretextual but instead consider the Respondent's rebuttal evidence.

The evidence, including the considerable number of other employees who received similar warning under similar circumstances, establishes that Respondent would have taken the same action even in the absence of protected activities. Therefore, I recommend that the Board dismiss the allegations arising out of complaint paragraph 12(b).

Complaint Paragraphs 12(c) and 12(d)

Complaint paragraph 12(c) alleges that about November 12, 2013, Respondent suspended employee Glenn Gray. Respondent has denied this allegation, but it admits that on about November 13, 2013, it discharged Gray, as alleged in complaint paragraph 12(d).

Complaint paragraph 12(e) alleges that Respondent took these actions because of Gray's Union and protected concerted activities, and complaint paragraph 14 alleges that Respondent thereby violated Section 8(a)(3) and (1) of the Act. Respondent has denied these allegations.

Management witnesses consistently testified that Respondent discharged Gray for "stealing company time" and that this was the only reason for the termination of his employment. Accordingly, the earlier oral warnings for clocking in late have limited relevance. Even though Gray returned late from lunch, the additional time was "off the clock" and Respondent did not pay Gray for it. By comparison, when Respondent asserted that Gray was "stealing company time," it was referring to time after Gray had clocked in and for which Respondent would pay him.

The events leading up to Gray's discharge began on about October 14, 2013, when employee James Acton approached Supervisor Elieser Nieto. Acton, who was one of Vice President Gasparini's "magnificent seven" circulating the decertification petition, did not testify, and so the only account of this conversation comes from the testimony of Nieto.

Acton's testimony might have cleared up exactly what he said to Nieto about Gray. Did Acton say that Gray would clock in after lunch and then go to the *restroom*, or did he tell Nieto that Gray would return from lunch, clock in, and then go to the *break room*? At one point, Nieto said "restroom" but then corrected himself:

> Q. Now you stated that Mr. James Acton informed you that Mr. Gray was in the bathroom for a long time, is that what he told you?
> A. That he was clocking back in from lunch and going to the restroom.
> Q. Okay.
> A. Or not the restroom. Going back into the break room.

Because of my doubts about the reliability of Nieto's testimony, I do not rule out the possibility that when Nieto quoted Acton as saying that Gray clocked back in and went to the *restroom*, it was the sunlight of truth peeking out for a moment from behind the cloud. The distinction matters because the Respondent allows employees to use the restroom during their working time, and they do not have to obtain advanced permission to do so. Therefore, Gray was not "stealing company time" if he spent that time in the restroom because the Respondent

permits employees to use the restroom while they are "on the clock." However, employees on duty do not have permission to go to the *break room* apart from their schedule breaks.

Gray testified that he must take a medication which causes the side effect of diarrhea.[6] This effect can strike unpredictably but it often occurs after a meal. So, it is not uncommon that Gray, upon returning from lunch, would experience a sudden urgent need to use the restroom.

Grey testified that he had told supervisors about this need and, based upon my observations of the witnesses, I credit Gray's testimony. As noted above, the Respondent does not require employees to seek prior permission before going to the restroom. Thus, Senior Human Resources Representative Fulmer testified as follows:

> Q. You're not aware that employees can self-release to go to the bathroom at any time.
> A. Oh, yes, they can.
> Q. And that bathroom time is built into the standards, correct?
> A. Correct.

Additionally, the record does not suggest that any supervisor had ever told Gray to spend less time in the restroom.

Notwithstanding Gray's need to use the restroom more than most other employees, his production statistics were good. Both his immediate supervisor, Nieto, and Director of Operations Thornton testified that Gray was a good worker. Indeed, in Gray's October 23, 2013 performance appraisal, Nieto wrote: "Thank you for your hard work and dedication it is greatly appreciated."

By the date of that appraisal, Nieto already had undertaken to investigate Gray based on Acton's complaint. Respondent watches its employees with a system of surveillance cameras, both open and hidden, and Nieto began reviewing these recordings. Bargaining unit employees also wear wireless computers on their arms. They receive work instructions from the computers and enter information as they complete tasks. Nieto mined this data as well.

On October 23, 2013, an event occurred which Respondent later would cite as the reason for its investigation of Gray, that is, the reason for its suspicion that Gray was "stealing time." This incident began when Gray returned from lunch.

As noted above, employees use their badges to clock in and out and on this date, Gray's badge would not work when he left for lunch and when he returned. Gray testified:

> Q. Were you able to clock out and in for lunch that day?
> A. No, sir. I couldn't even clock in for the day, because when I tried to clock in for the day at seven something, my badge wouldn't work, so I would swipe it, and it would just make this beeping noise. And Darrell heard it

[6] Gray and other witnesses used the euphemism "stomach problems" but the context leaves no doubt about the nature of the problem.

> beeping and he said, Well--he said, Well, G, I see you here on time, just fill out one of those missed punched forms. I said, yes, sir, I will. And that's the policy that we're supposed to do, and I did that.

Employees use "missed punch forms" to record their times clocking in and out when their badges don't work. Gray wrote on the form that he clocked out for lunch at 12:55 and clocked back in at 1:25. Gray testified that "as I was headed through the door to return to work, my stomach start bothering me, so I went to the restroom. And you know, I was in there a pretty significant amount of time. I'm not denying that."

Later, when Respondent sent an email notifying the Union it intended to discharge Gray, it cited this matter as the "triggering event" prompting the investigation:

> Triggering Event:
>
> On 10/23/13, Glenn's badge wasn't working so he had to fill out a missing punch form. Glenn wrote on the sheet that he went to lunch from 12:55PM until 1:25PM. However the cameras showed that Glenn did go to lunch at 12:55PM but returned to the work floor at 1:52PM. He falsified a work document.

During the hearing, Respondent showed this email to Supervisor Nieto and asked him about it:

> Q. --Mr. Nieto beginning on the bottom of the first page of that document and continuing for the next two pages regarding a chronology of events, correct?
> A. Correct.
> Q. Now did you prepare that chronology?
> A. This information I did prepare and forwarded it to my upper management team. But this is retyped by them.
> Q. Okay. But does this track the investigation that you conducted?
> A. Correct.
> Q. Okay. Now the triggering event that's indicated is that Mr. Gray's badge wasn't working on October 23 so he filled out a missed-punch form?
> A. Correct.
> Q. Showing you General Counsel Exhibit 21. Can you identify what that document is?
> A. This is whenever someone forgets their badge. We give them this form so they could keep it throughout the day. Right there, they write their own times in there, what time they clocked in, what time they went to lunch, what time they clocked back in from lunch and what --what time they left the warehouse.
> Q. And on that particular form, when does Mr. --and when does Mr. Gray indicate that he returned to work from lunch?
> A. It says 1:25 -
> Q. And -
> A. --p.m.

Q. --did you review camera footage to determine Mr. Gray's activities on October 25th?
A. Yes.
Q. And what did you review of the video reveal?
A. That he was out in the break room for a substantial --longer than --than the 30 minutes. He was out there longer than 30 minutes.
Q. In other words, he was --he had clocked back in after 30 minutes and was on the clock but had not returned to work.
A. Correct. And in that case right here there is not even a point to go and clock in. He -
Q. In other words, he himself actually manually wrote that -
A. Correct.

The email's statement that this October 23, 2013 matter was the "triggering event"—a statement with which Nieto agrees in the testimony quoted above—is untrue. The actual "triggering event" was James Acton's October 14, 2013 complaint about Gray to Nieto. However, if the Respondent had disclosed that it had begun investigating Gray because of Acton's complaint, that might have raised the Union's suspicions. The Union would have been well aware that Acton was one of Gasparini's "magnificent seven" who had solicited signatures on the decertification petition.

Although Nieto testified that he reviewed video recordings, these recordings are not in evidence. For reasons discussed further below, I do not believe Nieto and do not credit his testimony that Gray clocked in and then spent 30 minutes or more in the break room. To the contrary, crediting Gray, I find that he clocked in and then had to use the restroom.

However, Respondent claims that the October 23, 2013 incident was merely the "triggering event" and that Nieto's investigation discovered that Gray "stole company time" on other occasions. Its November 11, 2013 email, notifying the Union of its intent to discharge Gray, cited Gray's actions on 10 different days.

Nieto spent considerable time and effort reviewing the videos and mining the computer data. His review included most of October and all of August 2013. However, he did not analyze the data and recordings for September.

On November 11, 2013, the Respondent notified the Union of its intent to discharge Gray. Business Agent Kaleskas informed Gray. When he went to work on November 12, Gray spoke with Operations Manager Anderson. Later that same day, the Respondent sent Gray home, but paid him for the day. The General Counsel's brief argues that this action constituted discipline even though Gray did not suffer a financial loss:

> Suspension removes him from the workplace, and places a cloud over his future employment with the employer.

Clearly, Respondent sent Gray home in connection with its decision to discharge him. In agreement with the General Counsel, I conclude that doing so constitutes an adverse employment

action even in the absence of a monetary loss. Accordingly, I conclude that the General Counsel has proven that on November 12, 2013, Respondent suspended Gray, as alleged in complaint paragraph 12(c).

On November 13, 2013, the Union bargaining committee met with the Respondent's committee in their continuing negotiations for a collective-bargaining agreement. After that meeting, representatives of the Union and the Respondent discussed the Gray matter but the Union did not persuade Respondent to relent. Respondent discharged Gray.

In examining the lawfulness of the suspension and discharge, I again follow the Board's *Wright Line* framework. Clearly, Gray engaged in extensive union activity, including being part of the union group which went to the Respondent's shareholders meeting, and speaking at that meeting. Obviously, the Respondent had knowledge of these activities because at that meeting, Gray addressed the Respondent's CEO and engaged in some conversation with him. Moreover, Respondent's top managers at the facility mentioned Gray's appearance when he returned to work.

Additionally, the record proves that Respondent harbored animus against the Union. As discussed above, the General Counsel does not have to prove specific animus directed at Gray to carry the government's initial burden.

See *Libertyville Toyota*, above. Accordingly, I conclude that the General Counsel has proven that Gray's union activity was a motivating factor in Respondent's decision to discharge him.

Notwithstanding that it is not necessary for the government to prove animus directed at Gray, I conclude that such specific animus is present here. Animus can be inferred from the total circumstances. See *Sears, Roebuck & Co.*, 337 NLRB 443(2002).

Additionally, animus may be inferred from pretext. *North Fork Services Joint Venture*, 346 NLRB 1025 (2006). For the reasons discussed below, I conclude that the Respondent's asserted reason for discharging Gray, for "stealing company time," is false and pretextual. Accordingly, I infer that Respondent harbored animus specifically directed at Gray. Additionally, because Respondent's claimed reason is pretextual, Respondent's argument that it would have taken the same action against Gray in any event will not be considered.

Pretext

For a number of reasons, I conclude that Respondent's claimed reason for discharging Gray, that he "stole company time," is a pretext. Considering how often the Respondent has resorted to pretext and pretense in its fight against the Union, Respondent's explanation for Gray's termination carries a strong piscine fetor.

Indeed, even the reason which the Respondent gave to the Union to justify its extensive investigation of Gray—the so-called "triggering event"—is itself pretextual. Respondent had begun this investigation well before the date of the supposed "triggering event."

Moreover, the "triggering event" itself was based on falsehood. The assertion that Gray returned from lunch and spent a half hour in the break room is untrue. The side effect of Gray's medication caused him to spend a half hour in the restroom, and Respondent permits its employees to use the restroom. Even with such urgent interruptions, Gray met Respondent's productivity standards and received good appraisals.

In finding that, on October 23, 2013, Gray spent the time in the restroom rather than the break room, I specifically credit Gray and do not credit Nieto. For the following reasons, I doubt the reliability of Nieto's testimony.

Nieto was not a disinterested witness but rather Respondent's admitted supervisor and agent. Moreover, Nieto's ultimate superior at the facility was Vice President and General Manager Gasparini, whose own example communicated his attitude and expectations to subordinates.

As discussed above, on at least one occasion, Gasparini instructed supervisors to assist in breaking the law by going "the other way" when members of his "magnificent seven" came around to solicit signatures on the decertification petition. He thus communicated to supervisors that it not only was okay to flout federal law but was expected. Indeed, as Allen's credited testimony establishes, Gasparini left little doubt that he expected his instructions regarding the decertification campaign to be followed.

Moreover, on one occasion Gasparini told a witness subpoenaed by the Board to "go in there and say you don't remember." Vice President Gasparini gave this instruction to a bargaining unit employee fully protected by the Act. If he gave similar instructions to his subordinate supervisors and managers, such as Nieto, they would feel even greater pressure to be forgetful. In fact, during his testimony, Nieto answered a number of questions by asserting that he could not remember.

Nieto reviewed computer records of the breaks Gray took each day for a period during October 2013 and for all days Gray worked in August 2013, but Nieto did not review any computer data for September. That omission in itself raises some doubt about whether Respondent was trying to get accurate information over a broad time period or was being selective in an effort to build a case against Gray. It also is puzzling that Nieto could offer no reason for this exclusion:

> Q. Now do you specifically recall going back in the computer and reviewing Glenn's breaks for the entire month of August?
> A. Yes. Yes. It's coming back, yes.
> Q. Why did you do that?
> A. Just to see how far it extends, how far it goes.
> Q. Why that particular month?
> A. I can't recall why that particular month.
> Q. Why not September?
> A. I couldn't tell you why.

Nieto's professed inability to remember material facts would affect my assessment of his credibility even if Respondent's vice president had not told another witness to "go in there and say you don't remember." Parts of Nieto's testimony lead me to suspect that his claimed memory problem was selective. For example, while cross-examining Nieto, the Union asked about Artis Dobie, the one other employee Respondent had discharged for "stealing company time." Nieto testified as follows:

> Q. All right. Dobie was terminated when?
> A. That's not why I'm here, so I didn't even look up anything for Dobie. So I have no clue when --when he was terminated.
> Q. Wasn't he terminated shortly after you became a supervisor?
> A. Again, I don't really recall. I would have to look at my documents.
> Q. Wasn't it doing the Union organizing drive?
> A. I believe that the Union had already been put in place, no contract, but the Union was already in the warehouse. But I don't concern myself with that. I run an operations. I could care less if you're Union or non-Union.
> Q. I understand. Dobie was a Local Union supporter, wasn't he?
> A. Yes, he was. Very vocal.

It seems curious that although Nieto professed disinterest in the Union—"I could care less"—the fact he did remember about Dobie was that Dobie supported the Union. Indeed, Nieto volunteered that Dobie was a "very vocal" union supporter. Other facts about Dobie presumably were so unimportant they faded from Nieto's memory, but Dobie's vocalness as a union supporter stuck in Nieto's mind. Nieto's claimed disinterest in the Union is, I conclude, both self-serving and disingenuous.

Nieto investigated vocal union supporter Dobie in the same way he investigated vocal union supporter Gray. Thus, Nieto testified:

> Q. Okay. And do you know of any other employees who have been fired for stealing Company time at the Lakeland facility?
> A. Yes.
> Q. Who?
> A. Artis Dobie.
> Q. Artis Dobie. Would --did you have any involvement in Mr. Dobie's discharge?
> A. I gathered the information the same as Mr. Gray and I sent that up to HR.

However, Nieto's "gathering" of information can hardly be considered an impartial investigation. The fact that he skipped September, the month before the "triggering event" but instead harvested data from August raises questions, and Nieto's inability to give a reason—"I couldn't tell you why"—raises suspicions.

Additionally, Respondent did not call Nieto's supervisor, Operations Manager Anderson, even though Nieto testified that he informed Anderson that he was going to investigate Gray,

reported back to Anderson when he finished his investigation and provided Anderson a copy of the report he sent to Director of Operations Thornton. Anderson's absence from the witness stand also raises questions.

Perhaps the biggest question is why Respondent would expend a great amount of time and effort to make a case against an admittedly good employee who met the Respondent's production standards. The same day as the so-called "triggering event," Supervisor Nieto issued Gray a 6-months performance appraisal. On this appraisal Nieto stated: "Glenn is very knowledgeable over a wide range of job responsibility and is always willing to help where needed."

Nieto also stated on this appraisal: "Glenn is on the right track to end FY14 on a good note." Nieto concluded Gray's appraisal with these words: "Keep up the good work!!" (Double exclamation mark in the original.)

Also, as already noted, Gray's performance met Respondent's numerical standards. It seems improbable that Respondent would devote the time Nieto spent to make a case against an employee who met those standards, who was "very knowledgeable" and who was "always willing to help." Typical business concerns, such as productivity, do not explain why Respondent would want to get rid of an employee who was contributing to that productivity. The Respondent's antiunion animus does provide an explanation.

The defining characteristic of a "pretext" is not merely dishonesty but calculated dishonesty. A pretext entails a deliberate, cynical fabrication of a falsehood, and sometimes can involve a considerable expenditure of time and effort. The record establishes that, in Respondent's dealings with the Union, such artifice came close to being standard operating procedure.

Respondent's detailed plot to gather signatures on the decertification petition illustrates its limberness with subterfuge. The fake walkie-talkie messages which called supervisors out of the meetings they had convened, thereby allowing the solicitation, were pretextual. Similarly, the "triggering event" language in Respondent's November 11, 2013 email to the Union provides another example of Respondent's willingness to use pretext.

The conduct of Vice President and General Manager Gasparini also demonstrates that Respondent felt little need to be honest. As discussed above, employee Leonard Vera credibly testified that, after he received a subpoena from Board investigators, Gasparini approached him. According to Vera, Gasparini said, "you go in there and say you don't remember, because you don't."

Gasparini's instruction reasonably can be understood in only one way, as a direction to an employee to be less than candid during the government investigation. Stating a pretextual reason for the discharge of an employee is also a lack of candor during a government investigation.[7]

[7] Additionally, depending on the circumstances, it also could amount to a federal crime. If an employee, following Gasparini's instruction, had falsely told federal investigators he did not remember a material fact, it could constitute a violation of 18 U.S.C. § 1001.

Indeed, the way Gasparini began this conversation with Vera suggests some affinity for artifice. Gasparini's instruction, "act like I'm talking to you about your nighttime job," invited Vera to engage in a pretense.

Credited evidence, discussed above, also establishes that when Betterley and Seaton were circulating the "go away" letter in the summer of 2013, Gasparini approached employee Patrick Myers and told him that if anyone came up to him with something to read, it would be in Myers' best interest to sign it. Gasparini began and ended this conversation by stating that it "never happened."

Gasparini's "never happened" comments suggest that he well knew that he was doing something improper but decided to do it anyway. It also indicates that Gasparini was prepared to deny that it happened. Of course, the very purpose of a pretext is to deny that something improper happened.

Thus, the credited evidence paints a consistent picture of a Respondent with scant respect for either truth or the law and a willingness to sacrifice the former to circumvent the latter.

Moreover, Respondent had an unusually strong, albeit unlawful, motivation to discharge a good employee and thereby be in need of a pretext. The employee had embarrassed the Respondent's chief executive officer before the assembled stockholders and in the *Wall Street Journal*. Indeed, the Union's appearance at the shareholders meeting likely did much more than embarrass the CEO. The Union reported that shareholders rejected the CEO's compensation package.

For all these reasons, I conclude that Respondent's claimed reason for Gray's discharge, "stealing company time," was pretextual. Therefore, I do not consider the evidence Respondent offered as rebuttal to the General Counsel's case.

Further, I recommend that the Board find that, by suspending Gray on November 12, 2013, and discharging him on November 13, 2013, the Respondent violated Section 8(a)(3) and (1) of the Act.

Summary of Unfair Labor Practice Findings

Here is a summary of my unfair labor practice findings and conclusions. Paragraph references are to the further amended consolidated complaint and notice of hearing dated May 2, 2014, which I have referred to above as the "complaint."

Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraphs 6, 7, 8, 9(a) and (b), 10(b), 11(a), 12(b), (c), and (d).

Respondent violated Section 8(a)(3) of the Act by the conduct alleged in complaint paragraphs 11(a), 12(b) and (c). In conjunction with these findings, I have also found that the General Counsel has proven the allegations in complaint paragraphs 11(b) (unlawful motivation

in discharging Culbert), and 12(e) (unlawful motivation in discharging Gray).

Respondent violated Section 8(a)(5) of the Act by the conduct alleged in complaint paragraph 10(b). In conjunction with this finding, I have also found that the General Counsel has proven the allegations in complaint paragraphs 10(c)(mandatory subject of bargaining) and 10(d)(Respondent did not afford the Union prior notice or opportunity to bargain).

I have found that the Respondent did not violate the Act by the conduct described in complaint paragraph 10(a)(alleging elimination of the paid Gold's Gym benefit), by the conduct described in complaint paragraph 12(a)(oral warning issued to Gray on May 2, 2013) and 12(b)(oral warning issued to Gray on September 5, 2013).

Additionally, I have declined to find that the discharges of Culbert and Gray violated Section 8(a)(5) of the Act under the *Alan Ritchey* theory advanced by the General Counsel. Therefore, I have made no findings concerning the allegations in complaint paragraphs 11(c), (d), (e), 12(f), (g), and (h).

REMEDY

In reaching the conclusions that Respondent violated the Act in the manner described above, I have not taken into account the informal settlement agreement which Respondent signed on December 11, 2011, in previous unfair labor practice cases, which is in evidence as General Counsel's Exhibit 2. That agreement includes a nonadmission clause and, in considering the unfair labor practice allegations, I have drawn no inferences of any kind from this settlement. In considering a remedy, however, it is appropriate to note that Respondent, without admitting it had committed any violations, nonetheless promised that it would not commit any like or related violations in the future.

Pursuant to that settlement, Respondent posted notices which assured employees that it would not interrogate employees about their union activities or sympathies, would not solicit grievances and impliedly promise to remedy them, and would not prohibit employees from distributing literature in nonwork areas during nonwork time. However, not long after this posting period expired, Respondent embarked on a new round of violations.

As the certification year neared completion, the Respondent began a carefully planned effort to circulate a petition to decertify the Union. Only one of the violations found in the present case breaks a promise made in the previous settlement: On one occasion the Respondent prohibited distribution of literature in its parking lot. However, the other violations, including the discharge of two employees, represent an escalation in Respondent's campaign against the Union.

In other words, when Respondent entered into the previous settlement, it disavowed certain means but its subsequent conduct proved that it acted with the same unlawful objective which had been alleged (but not admitted) in the settled cases. Except in one instance, the unfair labor practices found in this case do not fall within the literal language of the specific "We Will Not" promises in the notices Respondent had posted, but the conduct was even more destructive,

resulting in the unlawful discharges of two employees.

The Respondent has pursued the goal of ousting the Union with the tenacity of people who consider their cause just, themselves clever, and their deeds invisible. Moreover, the very highest official at Respondent's facility led the effort and involved himself in its minute details. Vice President and General Manager Gasparini himself told supervisors to "go the other way" when they saw one of his "magnificent seven" circulating the decertification petition. Gasparini himself told two employees it would be in their best interest to sign the letter telling the Union to go away, even though he admitted to one of them he knew he was not supposed to do so.

Moreover, as discussed at some length above, Gasparini told an employee who had been subpoenaed during the Board investigation to "go in there and say you don't remember." The complaint does not allege this action as a violation and therefore I have not found one, but the words still concern me greatly because they manifest such disrespect for the Board's processes and, indeed, for law more generally.

Considering the involvement of this high-ranking official in the Respondent's effort to decertify the Union, considering his willingness to make coercive statements to an employee while telling the employee it "never happened," and considering that he told a subpoenaed employee to "say you don't remember," a climate conducive to unfair labor practices will persist at the facility until this official makes clear to subordinate managers that he has disavowed the unlawful means *and* the unlawful end, and they must do so as well. Therefore, I recommend that the Board order the Respondent both to post the notice to employees attached to this decision as Appendix A, but also order the Respondent to have its vice president and general manager at the Lakeland facility read the attached notice out loud to the bargaining unit employees, in addition to the customary posting of the notice to employees physically in the facility.

Further, I recommend that the Board require Respondent to distribute the notice electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employee/s by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Moreover, Respondent must reinstate Culbert and Gray to their previous positions or to substantially equivalent positions should their previous positions no longer exist, remove all references to the unlawful discipline from their files, and make them whole, with interest, for all losses they suffered because of Respondent's unlawful actions. Backpay should be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Additionally, I recommend that the Board order the Respondent to compensate the discriminatees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (August 8, 2014).

Respondent also has violated the Act by unilaterally ceasing to sponsor employees in the annual Gasparilla event, without first notifying and bargaining with the Union concerning this change and its effects. Therefore, I recommend that the Board order Respondent to restore, at the Union's request, its sponsorship of employees in this until and continue this sponsorship, to notify and bargain with the Union if it still wishes to discontinue such sponsorship, and to continue this sponsorship until it reaches agreement with the Union or until reaching an impasse in good faith. Further, I recommend that the Board order the Respondent to make whole, with interest, employees who participated in the Gasparilla event after the time of Respondent's discontinuance of sponsorship, for the cost of transportation to the event and for the fees required for participation in the event.

Conclusions of Law

1. The Respondent, McKesson Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At the relevant times material to the complaint, Manager Chudney Allen was a supervisor of Respondent within the meaning of Section 2(11) of the Act and its supervisor within the meaning of Section 2(13) of the Act. At all material times the following individuals have been and are supervisors of Respondent within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Vice President and General Manager Jeffery Gasparini, Director of Operations Cynthia Thornton, Assistant Director of Operations Jeff McCoy, Operations Manager Darrell Anderson, Employee Relations Manager Desiree Lyles Wallace, Senior Human Resources Representative Norman Fulmer, and Supervisors Scott Garrett, Johnny Gonzalez, Accino Hart, and Elieser Nieto, at all material times Larry Betterley and Pamela Seaton have been agents of Respondent within the meaning of Section 2(13) of the Act.

3. The Charging Party, International Brotherhood of Teamsters, Local 79, is a labor organization within the meaning of Section 2(5) of the Act.

4. Since October 13, 2011, the Charging Party has been and is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the following unit of Respondent's employees, which is appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time material handlers, lead material handlers, maintenance technicians, assistant maintenance technicians, lead maintenance technicians and maintenance employees employed by the Employer at its distribution center facility in Lakeland, Florida; excluding all other employees, "lumpers", office clerical employees, quality control employees, inventory employees, managerial employees, confidential employees, guards and supervisors as defined by the Act.

5. Respondent violated Section 8(a)(1) of the Act by soliciting employees to sign a petition to get rid of the Union as their exclusive bargaining representative; by prohibiting employees from distributing union literature in its parking lot during their nonworking hours; by providing employees with a letter to sign which was addressed to the Union and which asked the Union to withdraw unfair labor practice charges against Respondent, to permit a decertification vote to proceed, and/or to disclaim interest in representing the bargaining unit, by soliciting employees to sign this letter and by threatening them with unspecified reprisals if they did not; by ceasing its sponsorship of employees to participate in the annual Gasparilla event, by discharging employee Kathy Culbert, and by suspending and discharging employee Glenn Gray.

6. Respondent violated Section 8(a)(3) of the Act by discharging employee Kathy Culbert and by suspending and discharging employee Glenn Gray.

7. Respondent violated Section 8(a)(5) of the Act by unilaterally ending, without affording the Charging Party prior notice and an opportunity to bargain concerning the decision and its effects, its previous sponsorship of its employees in the Gasparilla event, which was a mandatory subject of collective bargaining.

8. Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[8]

ORDER

The Respondent, McKesson Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Soliciting employees to sign, and/or providing material assistance to those soliciting employees to sign, a petition to decertify the Charging Party as its employees' exclusive bargaining representative.

(b) Providing to its employees a letter asking the Charging Party to withdraw unfair labor practice charges or to disclaim interest in representing Respondent's employees, soliciting employees to sign, and/or providing material assistance to those soliciting employees to sign, and/or threatening its employees with reprisals if they do not sign the letter.

(c) Prohibiting employees from distributing union literature in its parking lot during their nonwork time.

(d) Unilaterally, without affording the Charging Party prior notice and an

[8] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

opportunity to bargain regarding the decision and its effects, ceasing sponsorship of employee participation in the Gasparilla event.

(e) Suspending and/or discharging employees because they formed, joined, or assisted a labor organization or engaged in protected concerted activities and/or to discourage employees from engaging in these activities.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to employees Kathy Culbert and Glenn Gray to their former positions, or to substantially equivalent positions of their former positions no longer exist, and make them whole with interest, for all losses they suffered because of the unlawful discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(b) As part of the make-whole remedy set forth in subparagraph 2(a) above, compensate employees Kathy Culbert and Glenn Gray for any and all additional Local, State and Federal taxes which they must pay because backpay is made to them in lump-sum payments, and file with the Social Security Administration all necessary reports to allocate the backpay to the appropriate calendar quarters, in accordance with the Board's decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of Kathy Culbert and the unlawful suspension and discharge of Glenn Gray, and within 3 days thereafter notify Culbert and Gray in writing that this has been done and that these rescinded disciplinary actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards and records, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) On the Charging Party's request, fully restore the practice of sponsoring its employees' participation in the Gasparilla event, including the payment of local transportation costs to and from the event and all entry and registration fees necessary.

(f) Make whole every employees who participated in the event after Respondent ended its sponsorship by reimbursing those employees for local transportation costs and entry and registration fees they paid to participate.

(g) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees which are mandatory subjects of collective bargaining, notify and, on request, bargain with the Charging Party as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> All full-time and regular part-time material handlers, lead material handlers, maintenance technicians, assistant maintenance technicians, lead maintenance technicians and maintenance employees employed by the Employer at its distribution center facility in Lakeland, Florida; excluding all other employees, "lumpers", office clerical employees, quality control employees, inventory employees, managerial employees, confidential employees, guards and supervisors as defined by the Act.

(h) Within 14 days after service by the Region, post at its facilities in, copies of the attached notice marked "Appendix A."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2012. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 4, 2014

Keltner W. Locke
Administrative Law Judge

[9] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT solicit employees to sign a petition to decertify the Union or provide material assistance to any effort to decertify the Union.

WE WILL NOT provide employees with a letter to be signed by employees to petition the Union to withdraw unfair labor practice charges, to permit a decertification vote, or to disclaim interest in representing the bargaining unit.

WE WILL NOT solicit employees to sign such petitions or letters and will not threaten them with unspecified or other threats if they do not.

WE WILL NOT cease sponsoring our employees' participation in the Gasparilla event.

WE WILL NOT suspend or discharge our employees because they participated in forming, joining or supporting the Union, engaged in union activities or other protected concerted activities, or to discourage other employees from engaging in such activities.

WE WILL NOT make any unilateral change in a term or condition of employment which is a mandatory subject of bargaining without first notifying the Union and affording the Union the opportunity to bargain with us concerning the change and its effects.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to employees Kathy Culbert and Glenn Gray

and make them whole, with interest, for all losses they suffered because of our unlawful actions against them.

WE WILL, on request by the Union, restore our sponsorship of employees to participate in the Gasparilla event.

WE WILL make whole those employees who participated in the Gasparilla event at their own expense after we unilaterally ceased sponsoring them, for the fees and costs they incurred.

MCKESSON CORPORATION
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, Suite 530; Tampa, FL 33602-5824
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-094552 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2455.